

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10

NESTLÉ PURINA PETCARE COMPANY

Employer

and

BAKERY, CONFECTIONARY, TOBACCO  
WORKERS AND GRAIN MILLERS  
UNION LOCAL 42

Petitioner

CASE NO. 10-RC-265325

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**NESTLÉ PURINA'S REQUEST FOR  
IMMEDIATE STAY OF MAIL BALLOT ELECTION**

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NESTLÉ PURINA PETCARE COMPANY**

Dated: October 12, 2020

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NOW COMES Nestlé Purina Petcare Company (“Nestlé Purina” or “Employer”) and, pursuant to Section 102.67 of the National Labor Relations Board’s Rules and Regulations, files this Request for Immediate Stay of Mail Ballot Election (“Request for Stay”) as directed by the Acting Regional Director for Region 10. Nestlé Purina requests the National Labor Relations Board (the “Board”) stay distribution of mail ballots and direct Region 10 to conduct a manual ballot election at the Employer’s Hartwell, Georgia facility, consistent with the COVID-19 protocols set forth in the General Counsel’s 20-10 Memorandum.<sup>1</sup>

The following extraordinary circumstances compel the Board to grant this Request for Stay to immediately stay the distribution of mail ballots scheduled to commence on October 23, 2020,

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<sup>1</sup> On July 6, 2020, General Counsel Peter B. Robb issued GC Memorandum 20-10 containing suggested manual election protocols and reiterating that “the Board has ultimate authority to make decisions on when, how and in what matter elections are conducted . . . .” See General Counsel Memorandum 20-10, *Suggested Manual Election Protocols*, at 1 (July 6, 2020).

pursuant to the Acting Regional Director's October 8, 2020 Decision and Direction of Election (the "Decision"):

- The Decision presents a substantial question of law or policy because it departs from Board precedent in *San Diego Gas & Electric*, 325 NLRB 1143 (1998).
- The Direction of a mail ballot election in this case is directly at odds with the Board's recent decisions in *Aspirus Keweenaw*, 370 NLRB No. 13 (August 25, 2020), *Perdue Foods LLC*, 370 NLRB No. 20 (Sept. 9, 2020); and *Airgas USA, LLC*, 16-RC-262896 (Sept. 24, 2020), where the Board granted the respective employers' emergency motions to stay mail ballot elections.
- A substantial question of law or policy is raised because neither Board precedent nor the record evidence in this case support the Acting Regional Director's decision to order a mail ballot election based solely on the general presence of COVID-19 in Hart County, Georgia, despite the Board's preference for manual elections, the Petitioner's willingness to participate in a manual ballot election, and the specific safety protocols in place at the plant to protect those involved in the election.
- The Acting Regional Director relied on stale data concerning COVID-19 in Hart County, Georgia that was not the most current, published data by state health authorities at the time of his decision.
- The Acting Regional Director's errors cannot be remedied in a post-election proceeding as the election will already have been completed.

As more fully set forth below, the Board should overturn the Acting Regional Director's Decision to mandate a mail ballot election when: (1) a manual ballot election can be safely conducted at Nestlé Purina's facility by following the Board's COVID-19 election protocols; (2) there is no evidence that any person has been infected with COVID-19 at the facility; and (3) Nestlé Purina demonstrates that the COVID-19 risk has been minimized at the specific plant when, as here, the employees in the appropriate voting unit report to work at the facility every day, and

the Employer has already instituted or will institute all reasonable safety protocols, including, but not limited to, those set forth in GC Memorandum 20-10.<sup>2</sup>

## **I. STATEMENT OF THE CASE**

On August 27, 2020, the Bakery, Confectionary, Tobacco Workers and Grain Millers Union Local 42 (“Petitioner”) filed a representation petition seeking certification as the collective bargaining representative of fifty-four (54) employees at Nestlé Purina’s Hartwell, Georgia manufacturing facility. The parties dispute the appropriateness of the Petition, as explained in Nestlé Purina’s Statement of Position<sup>3</sup> and at the Pre-Election Hearing, conducted September 22, 2020. At the Hearing and in the Post-Hearing Brief of Nestlé Purina Petcare Company,<sup>4</sup> Nestlé Purina identified two issues to be decided by the Acting Regional Director:

1. Whether production and warehouse employees who work next to each other in an integrated manufacturing facility constitute the smallest appropriate voting unit because of their strongly shared community of interest.
2. Whether Petitioner demonstrates “extraordinary circumstances” to support departure from a standard manual ballot election when the Employer’s facility is located in a local area with low pandemic activity and employees have not experienced any COVID-19 cases attributable to the work environment.

In Petitioner’s post-hearing briefing, it largely conceded that the Acting Regional Director should have ordered a manual ballot election. Specifically, Petitioner stated, “[B]ecause the Employer made assurances at the hearing that it would meet the safety protocols for an in-person election outlined in Memorandum GC 20-10, the Union will go forward with a manual election if

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<sup>2</sup> Nestlé Purina reserves the right to request the Board review the Acting Regional Director’s decision related to the scope of the voting unit in the future on a non-emergency basis.

<sup>3</sup> See Attachment A.

<sup>4</sup> See Attachment B.

one is directed.”<sup>5</sup> Thus, by the conclusion of hearing proceedings, both parties agreed that the Region could order and safely oversee a manual ballot election.

While the Decision discusses the presence of COVID-19 in Hart County, Georgia as of September 21, 2020, the data on which the Acting Regional Director relied is outdated and no longer represents relevant information. The Decision offers little explanation specific to Nestlé Purina’s Hartwell plant where a full complement of employees are and have been working daily during the pandemic, and there is no evidence of on-site transmission to anyone. Further, the Decision fails to address how the additional safeguards offered by Nestlé Purina and outlined by the Board’s General Counsel do not sufficiently ensure the safety of all involved in this particular election.

Although the Board allowed mail ballot elections over the first few months of the pandemic, the unknown risks of COVID-19 have significantly diminished. It is a known and manageable part of daily life for Nestlé Purina and its employees who report to work every day to perform essential work. Further, the spread of the pandemic has since declined as both employers and the general public adapt to what increasingly appears to be a new normal. Indeed, the General Counsel recognized these circumstances by issuing guidelines to conduct manual elections safely in the wake of COVID-19. GC Memorandum 20-10. Moreover, the Board’s recent decisions in *Aspirus Keweenaw*, 370 NLRB No. 13 (August 25, 2020), *Perdue Foods LLC*, 370 NLRB No. 20 (Sept. 9, 2020); and *Airgas USA, LLC*, 16-RC-262896 (Sept. 24, 2020) illustrate the Board’s recognition that it is an abuse of discretion for an Acting Regional Director to order a mail ballot election based on the mere existence of the pandemic. For eligible voters, all of whom report to the Hartwell facility every day, a manual election poses no additional risk.

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<sup>5</sup> See Attachment C, at 18.



## II. BACKGROUND

Nestlé Purina is a worldwide leader in pet product manufacturing. The Company manufactures three different categories or groups of pet products, which include litter, wet pet food, and dry pet food and treats. Nestlé Purina's Hartwell, Georgia facility (the "Hartwell facility") is the Employer's latest wet pet food manufacturing location. At the time of hearing, the Hartwell facility employs approximately 54 hourly, warehouse employees and 154 hourly, production employees.

The Hartwell facility has continued to operate at normal capacity during the pandemic. Nestlé Purina is an animal food manufacturer, which has been designated as a sector of essential critical infrastructure workers by the United States Department of Homeland Security, Cybersecurity & Infrastructure Security Agency. *See* U.S. Department of Homeland Security, Cybersecurity & Infrastructure Security Agency, *Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response, Version 4.0* (Aug. 18, 2020). As an essential business, Nestlé Purina has maintained full operations for the duration of the pandemic while complying with all government guidelines related to reducing the spread of the coronavirus including, but not limited to, those specific to face coverings, social distancing, and increased sanitation. All employees report to work on a daily basis for their scheduled shifts.

Notably, the Hartwell facility functions in accordance with all guidelines of the Centers for Disease Control ("CDC"). All of the following precautions (and others) are in place at the plant:

- Daily employee temperature checks;
- Daily employee exposure and contact screening questions;
- Third-party regular and extensive facility cleaning;

- Employee cleaning protocols for equipment use; and
- Mandatory mask or face covering requirements.

There have been no known work-related COVID-19 exposures at the Hartwell facility. Nestlé Purina has put its plant and employees in a safe position with strict, mandatory protocols.

### **III. THE ACTING REGIONAL DIRECTOR’S FINDINGS**

The Acting Regional Director based his Decision to hold a mail ballot election on the following conclusions relative to COVID-19:

- A September 21, 2020 County Indicator Report by the Georgia Department of Public Health “reported a greater than 5-percent increase in positive COVID tests and COVID-related emergency department visits for the previous week” and “classified Hart County as a ‘county with high transmission indicators.’” (Decision, at 5.)
- Georgia Governor Brian Kemp has implemented a Public Health State of Emergency and “ordered Georgia residents and visitors at higher risk for severe illness to continue to shelter in place until at least October 15.” (Decision, at 5-6.)
- To ensure all unit employees have an opportunity to vote, holding an election over two days “would require a Board agent to travel over 100 miles from the Regional Office in Atlanta and spend at least two nights in a hotel in an area which is currently categorized as a ‘county with high transmission indicators’ by the Georgia Department of Public Health. (Decision, at 9.)
- The Centers for Disease Control and Prevention estimates “that 50 percent of COVID-19 transmission occurs prior to the onset of symptoms, and that 40 percent of those infected with COVID-19 are asymptomatic. . . . Given the *possibility* of asymptomatic spread, the risk of spreading the disease to employees during the election, and to non-employee participants, is too great at this time.” (Decision, at 9-10 (emphasis added).)

The Acting Regional Director came to this conclusion even though an election would follow the same safety protocols already in place at the Hartwell facility and more. This means the existence of an election does not increase potential transmission rates at all because these

interactions exist with or without the voters being able to participate in a manual ballot election that maximizes voter participation.

Further, the Acting Regional Director improperly dismissed without due consideration the extensive precautions Nestlé Purina volunteered to implement and build upon the protocols identified by GC Memorandum 20-10. These additional measures include conducting the voting process in a large trailer, measuring 36 feet by 50 feet, outside the facility that will be modified to include large fans for increased air circulation. This outside structure guarantees social distancing and that observers and Board agents will not have to enter the Hartwell facility to complete their election requirements. Alternatively, Nestlé Purina offered at the pre-election hearing to erect a large tent structure so that voting could be conducted in an “open air” environment. Such additional safety precautions mitigate against the risk presented by COVID-19 and ensure that manual ballot voting can be completed in an environment as safe as any the Board can contemplate.

The Acting Regional Director’s Decision runs roughshod over the Act’s charge, and the Board’s statutory duty, to protect employee choice. The Acting Regional Director does this by elevating a hypothetical safety risk based on an obsolete report and over record facts that Nestlé Purina has existing measures in place and other measures are proposed (fully consistent with the GC Memorandum 20-10) to safely conduct a manual ballot election at the Hartwell facility. Indeed, if the Acting Regional Director sought to protect employee free choice, a manual election would occur because a manual election improves participation rates and would not increase employee interaction or proximity or exacerbate COVID-19 concerns.

#### **IV. APPLICABLE LEGAL STANDARDS AND ANALYSIS**

The Acting Regional Director erred by misapplying the holding of *San Diego Gas & Electric* and the NLRB’s *Casehandling Manual Part Two: Representation Proceedings*

(“Casehandling Manual”), Section 11301.2 (“Manual or Mail Ballot Election: Determination”). *San Diego Gas & Electric* establishes that Acting Regional Directors should consider mail ballots in three situations: (1) scattered voters, (2) scattered schedules, and (3) a strike or lockout. The Board left open the possibility that other extraordinary circumstances may be relevant to election-type decisions. *San Diego Gas & Elec.*, 325 NLRB at 1145, n.6.

Board precedent in representation cases rests upon the critical threshold consideration of which method of election best advances employee choice (voter turnout, ease of participation, etc.). Mail or mixed ballot voting only exists when necessary to “enhance the opportunity of all to vote.” *Casehandling Manual*, Section 11301.2. *San Diego Gas & Electric* stands for the same principle: “[e]xtraordinary circumstances” mandating a mail ballot election only occur when the Acting Regional Director “might reasonably conclude that [voters’] opportunity to participate in the election would be maximized by utilizing mail or mixed ballot election methods.” *Id.* at 1145. Specifically, a Regional Director must tie their exercise of discretion, even in cases of extraordinary circumstances, to the Board’s proper role in ensuring employee participation and free choice. *Id.* at 1145 n.10 (“A Regional Director should, and does, have discretion, utilizing the criteria we have outlined, to determine if a mail ballot election would be both more efficient and likely to enhance the opportunities for the maximum number of employees to vote.”).

Here, the Acting Regional Director did not base his Decision to hold a mail ballot election on the necessary extraordinary circumstances to support departure from the standard manual ballot election process. First, the Acting Regional Director relies on dated health statistics and a classification that is no longer applicable to Hart County. Based on the Acting Regional Director’s irrelevant case rate information, he then rankly speculated that an election places all participants at untenable risk of contracting COVID-19. Accurate information refutes the fear of hypothetical

harm. Second, the Acting Regional Director failed to address the far higher likelihood that any mail ballot election will suppress employee free choice by resulting in low voter turnout compared to a manual ballot process. Third, the Acting Regional Director briefly acknowledged safety precautions Nestlé Purina will take to ensure a safe voting environment, yet ignored them without cause to conclude that any manual ballot election places participants at unsubstantiated risk of contracting COVID-19. Fourth, the Acting Regional Director's mail ballot election eliminates the possibility for any manual ballot election to take place, which is a position in contravention of General Counsel guidance that sets forth protocols to conduct a safe election. These errors individually and collectively constitute an abuse of discretion that the Board must correct by ordering a manual ballot election.

**A. The Acting Regional Director Relied on Antiquated COVID-19 Case Data Instead of the Current Data that Establishes Conditions Are Safe to Conduct a Manual Ballot Election**

All of the Acting Regional Director's conclusions concerning the risks to voting, observer, and agent participants in a manual ballot election principally relied on dated information concerning Hart County COVID-19 cases that was no longer applicable or relevant at the time of the Decision. The Decision repeatedly refers to Hart County as a "county with high transmission indicators" based on a September 21, 2020 Georgia Department of Public Health County Indicator Report. The County Indicator Report on which the Acting Regional Director cited relies on case data for the 14-day period of September 5, 2020, through September 18, 2020.<sup>6</sup>

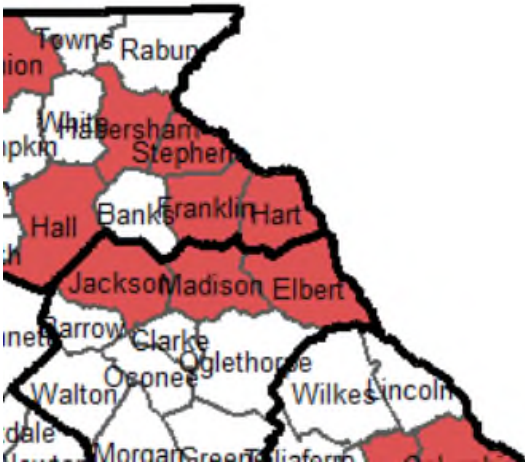
However, at the time the Acting Regional Director issued his Decision and Direction of Election, the Georgia Department of Public Health updated their report with significant revisions.

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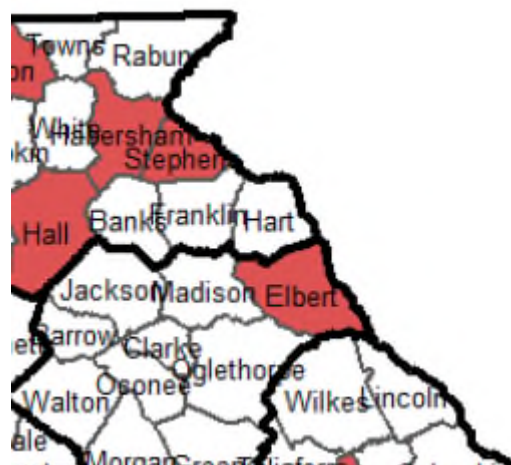
<sup>6</sup> (Decision, at 5, n.7 (citing Georgia Department of Public Health, *County Indicator Report* [https://countyindicatorreport.s3.amazonaws.com/county\\_indicator\\_report+9-21-2020.html#high-transmission-counties-1](https://countyindicatorreport.s3.amazonaws.com/county_indicator_report+9-21-2020.html#high-transmission-counties-1) (September 21, 2020)).)

*The updated and now-current report does not support the conclusions drawn from local health data in the Decision.* On October 5, 2020, the Georgia Department of Public Health released its County Indicator Report for the 14-day period of September 19, 2020, through October 2, 2020.<sup>7</sup> In stark contrast to the report on which the Decision relied, the current report removed Hart County from the list of “Counties with High Transmission Indicators.”

County Indicator Report  
Counties with High Transmission Indicators  
September 5, 2020 – September 18, 2020



County Indicator Report  
Counties with High Transmission Indicators  
September 19, 2020 – October 2, 2020



Further, specific case information published by the Georgia Department of Public Health demonstrates the virus is receding and nearly non-existent in Hart County. As of October 7, 2020, Hart County has a 7-day moving average of *just 2.6 cases per day*. Georgia Department of Public Health, *Daily Status Report*, <https://dph.georgia.gov/covid-19-daily-status-report> (last accessed October 12, 2020). This current rate is drastically less than the 7-day moving average of 9.6 cases per day that Hart County experienced approximately two months ago on August 2, 2020. These

<sup>7</sup> Georgia Department of Public Health, *County Indicator Report*, [https://countyindicatorreport.s3.amazonaws.com/county\\_indicator\\_report\\_201005.html#high-transmission-counties-1](https://countyindicatorreport.s3.amazonaws.com/county_indicator_report_201005.html#high-transmission-counties-1) (October 5, 2020).

figures conclusively establish that few, if any, areas of the country are as well-positioned as Hart County to safely conduct a manual ballot election.

They also refute any notion that a Board agent based in Atlanta is in any more danger of transmission if present for voting at Nestlé Purina's Hartwell facility. The Acting Regional Director broadly, and wrongly, asserted that travel to Hart County "would place the Board agent or Board agents assigned to run the election at an elevated risk of exposure to COVID-19." (Decision, at 9.) This conclusion is completely unsupported and wholly contradicted by the actual public health facts.

Comparatively, there is a far higher risk of transmission based on daily cases in Fulton County, the county surrounding Atlanta, where the 7-day moving average of cases is 120.3 per day. *Supra*, *Daily Status Report*. Again, with a 7-day moving average of cases of 2.6 per day, Hart County experiences a daily case rate that is a fraction – just 2.2% – of Fulton County's daily case rate. Just the opposite of the Acting Regional Director's conclusion, it is likely that any Board agent(s) from Atlanta would be *safer* in Hartwell, Georgia and Hart County to carry out a manual election than such individual would be at the Regional Office or virtually anywhere else in Atlanta, Georgia and Fulton County.

Moreover, Georgia's statewide public health directives do not present any basis to support conducting a mail ballot election over the standard manual ballot election. In explaining the need for a mail ballot election, the Acting Regional Director pointed to Georgia Governor Brian P. Kemp's "multiple Executive Orders declaring and extending a Public Health State of Emergency," which requires "Georgia residents and visitors at higher risk of severe illness to continue to shelter in place until at least October 15." (Decision, at 5-6.) However, this executive order fails to establish that any individuals in Hart County are under any greater risk of disease transmission.

Governor Kemp's public health executive order does not distinguish Georgia in any way from state-wide orders that exist in any other part of the country. Indeed, the Acting Regional Director could not identify any restrictions within that order that would prevent a Nestlé Purina employee or Board agent from attending an election. The executive order directive for individuals who are at higher risk for severe illness does not affect any employee who would be eligible to vote as unit employees all attend work at the Hartwell facility on a daily basis. And no evidence, or assertion by the Acting Regional Director, suggests that the Board is unable to send an agent for an election who does not present a higher risk for severe illness. Georgia's statewide executive order is a red herring that does not support conducting a mail ballot election.

Local conditions strongly support that the Board adhere to the standard manual ballot election process at the Hartwell facility. The Hart County case rate is low, making the possibility of any transmission among employees exceedingly unlikely. Employees are no more likely to miss the opportunity to vote because of COVID-19 than they are for any other personal, health, or family reason. The Acting Regional Director abused his discretion in ignoring these conditions in favor of aged statistics and speculative concerns of harm that are refuted by the facts when he ordered a mail ballot election.

#### **B. Mail Ballot Elections Result in Reduced Voter Turnout**

The Decision also fails to address the grave harm to employee free choice that an election causes by reducing the chances of full employee participation. An on-site election, as opposed to a mail ballot, creates greater percentage of employee participation than in mail ballot elections. The Office of the General Counsel observed in 2008 that over the course of 2006–2007, the participation rate in manual elections was 81.57%, as compared to approximately 65% in mail or mixed manual-mail ballot elections. *See* General Counsel Memorandum 08-05, *Report on the Midwinter Mtg of the ABA P&P Committee* (April 17, 2008).



Recent data definitively and empirically demonstrates that mail ballot elections significantly diminish voter turnout. During the week of March 7 to 13, 2020, more than 93% of manual ballots had a participation rate above 80% — only two out of thirty elections (6.7% of manual elections) resulted in lower rates. *See Wainfleet Co.*, No. 03-RC-256434 (63% rate); *Growing Seeds at Crystal Springs, Inc.*, No. 19-RC-256529 (75% rate). However, from March 14 to June 9, Acting Regional Directors exclusively ordered mail ballot elections and nearly 40% of elections had a participation rate of 80% or less.

During the pandemic, the reality of low-voter turnout in mail ballot elections has only worsened. Mail ballot elections have consistently resulted in less than 60% voter turnout. *See, e.g., Altec Industries, Inc.*, 10-RD-257071 (59%); *Paragon Sys., Inc.*, No. 09-RC-259023 (55%); *River Mkt. Comm. Co-op*, No. 18-RC-256986 (54%); *Univ. Protection Serv., LLC*, No. 10-RC-257846 (52%); *Triple Canopy, Inc.*, No. 27-RC-257463 (37%); *Am. Sec’y Programs, Inc.*, No. 05-RC-256696 (36%); *Children & Adult Disability Ed. Servs.*, No. 04-RC-256028 (40%), *TMW Contracting, LLC*, 10-RC-261728 (44%). And numerous reports of service cutbacks and various problems with the US Postal Service portend even more uncertainties about the efficacy of a mail ballot election. Badger, Emily et. al, *Is the Mail Getting Slower? Our Tracker Says Yes*, THE NEW YORK TIMES, <https://www.nytimes.com/interactive/2020/09/14/upshot/is-the-mail-getting-slower-tracker.html?action=click&module=Top%20Stories&pgtype=Homepage> (Sept. 21, 2020). The perception of the unreliability of voting by mail is likely to affect many people who will either not participate in the vote, or, even if they do, may resist the legitimacy of the outcome of the vote. This will be highly disruptive to industrial relations and any collective bargaining at this factory.

Further, in *Fontanini Foods, LLC*, the Regional Director extended the mail ballot period twice because of low turnout. No. 13-RC-257636 (Reg’l Dir. June 29, 2020). In that case, the

Region commingled the ballots and counted on June 17, 2020. However, after low turnout, the Regional Director extended the initial mail ballot period until July 1, 2020. The Regional Director then extended the period for a second time, until July 8, 2020, because only 227 of 401 (56.6%) mailed ballots had been returned as of June 29. Other issues also arose in that case, including: some employees had to pay to receive the Board package, missing ballots, duplicate ballots, and a few employees attempted to contact the Board but never heard back about ballot issues. Ultimately, the Region counted ballots and while it stated it received 227 ballots, the Region only counted 216. A manual election eliminates these concerns and best preserves the laboratory conditions for an election and the integrity of the voting process. Indeed, the Board has noted, “[m]ail ballot elections are more vulnerable to the destruction of laboratory conditions than are manual elections because of the absence of direct Board supervision over employees’ voting.” *Thompson Roofing, Inc.*, 291 NLRB 743 at n.1 (1988).

**C. The Acting Regional Director Improperly Dismissed the Extensive Safety Precautions Nestlé Purina Will Provide at the Hartwell Facility**

While acknowledging the “commendable” protections Nestlé Purina guaranteed to provide employees, observers, and the Board agent alike so all could participate in a safe election, the Acting Regional Director inexplicably disregarded these precautions without explanation. Instead, the Acting Regional Director rested on his unsupported premise that COVID-19 is found “directly outside the Employer’s factory.” (Decision, at 10.) However, the extensive precautions Nestlé Purina willingly proposed and agreed to provide ensures that what little virus activity exists in Hart County will not pose any legitimate risk to voting participants.

At the pre-election hearing, Nestlé Purina committed to complying with all safety protocols outlined in GC Memorandum 20-10. Moreover, Nestlé Purina offered to exceed the protocol requirements by implementing additional safeguards. These safety measures include providing a

ventilated trailer<sup>8</sup> that will be outfitted to maximize air circulation, limiting access to the voting area to maintain social distancing, marking floor surfaces to identify proper distancing measurements, providing dispensable voting tools and equipment, installing Plexiglas barriers to protect observers and the Board agent, providing hand sanitizers and wipes for all participants, and placing signage to communicate safety guidelines. As an alternative election site that incorporates all other safety precautions described above, Nestlé Purina also offered at the pre-election hearing to erect a large outdoor tent at the site of the Hartwell facility so voting can be completed in an “open air” environment. Following all the safety protocols in GC Memorandum 20-10, Nestlé Purina is committed to providing an environment that will allow employees to participate in a manual ballot election while doing nothing to increase COVID-19 transmission risk. The Acting Regional Director lacked a safety-based reason to depart from the preferred manual ballot election process.

In light of these facts, the Decision fails to follow precedent or the guidance of GC Memorandum 20-10. Moreover, the rationale of the Decision effectively finds that no manual vote can occur in Region 10 until the time the pandemic completely disappears. Indeed, the Acting Regional Director finds that, unless the risk of transmission can be eliminated, then no manual vote should occur. This threshold criterion (essentially one of, “absolutely no risk to anyone”), of course, is inconsistent with Board law, the guidance of the General Counsel, and simply empirically impossible to reach. There is always “risk” of harm in day to day activity – risk of accidents, risk of transmission of another disease, etc. But there is no showing on the facts and circumstances of this case that there is a significant risk of harm to anyone.

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<sup>8</sup> On October 3, 2019, Region 10 conducted a manual ballot election by maintenance/electrician employees in a similar trailer at the Nestlé Purina Hartwell site that did not require Board agents to enter the facility. *Nestle Purina Petcare Company*, NLRB Case No. 10-RC-247742.

**D. The Decision Violates Board Election Jurisprudence and is Inapposite to GC Memorandum 20-10**

The Board has discouraged automatic deference to mail ballot elections after initially pausing manual ballot elections as a result of the COVID-19 pandemic. On April 17, 2020, the Board announced that it reactivated election proceedings and stated, “Consistent with their traditional authority, Acting Regional Directors have discretion as to when, where and if an election can be conducted in accordance with NLRB precedent.” National Labor Relations Board, *COVID-19 Operational Status Update*, <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update> (April 17, 2020).

Thereafter, multiple Regions successfully conducted manual elections subject to social distancing procedures. *See, e.g., Hearthside Food Solutions LLC*, Case No. 15-RC-258901 (May 20, 2020 election), *Watson Bowman Acme Corp.*, No. 03-RC-262231 (Aug. 19, 2020 election). There has been no report of any problems with any manual ballot election taking place to date, and there is no reason to believe a manual ballot election will be any different at the Hartwell facility.

Further, the Board’s General Counsel has identified and explained protocols to conduct manual elections safely with the benefit of the latest health information. On July 6, 2020, the Board’s General Counsel, Peter B. Robb, released GC Memorandum 20-10 on “Suggested Manual Election Protocols.” GC Memorandum 20-10 outlines numerous protocols to ensure a safe manual ballot election. Nestlé Purina committed to comply with all the procedures listed. It will implement every suggestion in GC Memorandum 20-10, and it will work with both the Region and the Petitioner regarding any additional concerns. Indeed, in Petitioner’s post-hearing briefing, it explained it is ready and willing to proceed with a manual ballot election under the conditions and precautions to which Nestlé Purina committed at the hearing.

The Board also now closely scrutinizes Regional decisions to direct mail ballot elections. *Aspirus Keweenaw*, 370 NLRB No. 13 (Aug. 25, 2020) (granting review of Acting Regional Director decision to conduct mail ballot election), *Perdue Foods LLC*, 370 NLRB No. 20 (Sept. 9, 2020) (same), *Airgas USA, LLC*, 16-RC-262896 (Sept. 24, 2020) (same). Whereas Regions were once afforded the opportunity to rely on mail ballot election processing for a temporary, limited period, those exceptions are no longer automatically granted.

Simply put, the Acting Regional Director abused his discretion by rejecting the parties' preference for a manual ballot without any case-specific justification. The false presumption that social distancing cannot occur during an election is insufficient to support the instant Decision. There is no good reason that a manual ballot election cannot be done here.

**E. The Board Should Issue an Immediate Stay of Mail Ballot Distribution**

The Decision indicates that the Region will distribute mail ballots on October 23, 2020. To prevent potential voter confusion and irreparable injury to the election process, the Board should issue an immediate stay of mail ballots. *See Aspirus Keweenaw*, 370 NLRB No. 13 (Aug. 25, 2020), *Perdue Foods LLC*, 370 NLRB No. 20 (Sept. 9, 2020), *Airgas USA, LLC*, 16-RC-262896 (Sept. 24, 2020).

**V. CONCLUSION**

The Decision relies on speculation, not on the required facts, evidence, and precedent. Although the Acting Regional Director maintained some discretion to determine the manner of an election, his references to speculative risks do not justify the decision to choose an election method that depresses voter turnout and impairs employee free choice. The Board should immediately correct this error, grant this Request for Stay, stay the mail ballot election, and order a manual ballot election.

Respectfully submitted this 12<sup>th</sup> day of October, 2020.

OGLETREE, DEAKINS, NASH, SMOAK &  
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**ATTORNEYS FOR  
NESTLÉ PURINA PETCARE COMPANY**

**CERTIFICATE OF SERVICE**

I hereby certify that on October 12, 2020, a true and correct copy of the foregoing Nestlé Purina Request for Immediate Stay of Mail Ballot Election was Electronically filed as a .pdf document via the NLRB's e-filing system and transmitted via U.S. First-Class Mail to the Acting Regional Director and via e-mail to the Petitioner as follows:

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ACTING REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS BOARD  
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44448763.2

# **Attachment A**





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September 9, 2020

**VIA ELECTRONIC FILING**

Scott C. Thompson  
Acting Regional Director  
NLRB Region 10  
233 Peachtree Street NE  
Harris Tower Suite 1000  
Atlanta, GA 30303

RE: Nestlé Purina Petcare  
Case No. 10-RC-265325

Dear Mr. Thompson:

Nestlé Purina Petcare (“Nestlé Purina” or “Employer”) provides this position statement in response to the RC Petition filed by Bakery, Confectionery, Tobacco Workers and Grain Millers Local Union 42 (“Local 42”), Case No. 10-RC-265325.

For the reasons presented in detail below, the Regional Director should direct a manual election in this matter. Local conditions do not support an alternative mail ballot election, and Nestlé Purina provides a voting environment that mitigates against the risk of COVID-19 infection to ensure maximum participation of affected employees and the Board agent.

Additionally, the Regional Director should order that the scope of employees eligible to participate in the election includes all production and warehouse workers at Nestlé Purina’s Hartwell, Georgia facility. Local 42 seeks recognition as bargaining representative of a scope of employees that is impermissibly narrow under the recent Board precedent of *PCC Structural, Inc.*, 365 NLRB No. 160 (2017) and *The Boeing Company*, 368 NLRB No. 67 (2019). It seeks to fragment this factory with a micro-unit only including warehouse workers, excluding the production employees with whom they work. Board law does not support such an exclusion in a manufacturing facility. A broader unit consisting of production and warehouse workers is the smallest appropriate unit under the traditional community of interest analysis and Board precedent.

## **I. BACKGROUND FACTS**

Nestlé Purina is a leading manufacturer of dog and cat food that has been in business since 1894. It has 21 manufacturing facilities in the United States, nine of which are unionized. None of those factories have warehouse employees in a unit separate from the production employees. For example, the production and warehouse employees are represented by the petitioning union in the same unit at Nestlé Purina's factory in Fairburn, Georgia. The same is true at the Company's Edmund, Oklahoma factory where Local 399 of the petitioning union represents the production and warehouse employees in the same unit.

The Hartwell, Georgia facility is the newest factory built by Nestlé Purina. At this factory, Nestlé Purina first employed hourly workers in April 2018. At that time, the Hartwell facility opened as a distribution center. In November 2019, Nestlé Purina began to produce wet cat food to ship domestically and internationally. The facility encompasses over 600,000 square feet of floor space. As the factory is in its infancy stages, Nestlé Purina plans exponential growth at the location over the next two to three years. The Company's plans include adding employee locker rooms and breakrooms, among other improvements. These planned developments will further incorporate physically the production and warehouse employees.

Nestlé Purina employs approximately 289 employees at the Hartwell, Georgia facility. This workforce includes hourly production (145) and warehouse<sup>1</sup> (54) employees. All production and warehouse employees work the exact same schedule. Nestlé Purina maintains the same schedule for all warehouse and production employees because their work is interrelated – they rely on each other to retrieve materials and move finished product, among other tasks. Employees in both groups share the same starting pay rate, and all participate in a similar Pay Progression structure.

All production and warehouse employees follow the same set of Nestlé Purina work rules and handbook policies. These rules and policies include attendance requirements, a code of conduct, a corrective action and appeal process, overtime pay, health benefits, holidays, paid time off, and retirement benefits.

Hourly employees are subject to the same management and communication. The production and warehouse employees report to the same Factory Leadership Team and, ultimately, Factory Manager. While there are supervisors with primary responsibility for warehouse or for production, those report to the Factory Leadership Team headed by the Factory Manager. The same quality and safety managers oversee warehouse and production operations throughout the facility. Additionally, all employees rely on the same human resources team. Nestlé Purina's leadership team consistently communicates with all production and warehouse employees through the same methods. For example, prior to the COVID-19 pandemic, Nestlé Purina's practice was to hold communication meetings at the facility with employees across production and warehouse functions.

Warehouse and production employees currently experience significant overlap in their work areas. Production and warehouse employees work together to begin the manufacturing process by

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<sup>1</sup> The petition refers to the warehouse employees as "Distribution Employees."

transferring work in progress material to production lines. Nestlé Purina frequently assigns warehouse employees to assist with the hand feed of work in progress materials into the production equipment. Warehouse employees also train production personnel in forklift operation so those individuals may obtain necessary certification to properly use such equipment.

Additionally, consistent with Nestlé Purina's plans for facility expansion, the site's "variety pack area," where the distribution center heavily links to production, will double to triple in size and extend the overlap between departments. This expansion will increase the already significant overlap between production and warehouse employees. Preparing the variety pack products at the facility for shipment requires a high level of coordination between production and warehouse employees to intermix several different flavors of product into unique units. The near-term expansion of this product will bring production and warehouse employees closer together in performing overlapping duties.

Nestlé Purina's facility expansion and remodeling plans that will begin in the coming one to two months will also reduce the points of access to a single entry and exit point for all employees. Additionally, production and warehouse employees will share a single cafeteria and locker rooms. These changes will further promote an integrated employment environment at the Hartwell facility.

Qualifications for employment are similar across production and warehouse positions. Roles in each department require a high school diploma or GED equivalent. Employees at Nestlé Purina may use the facility's Job Transfer and Assignment process to transfer between production and warehouse departments. The same Job Transfer and Assignment policy that outlines this policy applies to both production and warehouse employees. Since March 2019, six employees have transferred from warehouse to production positions at the Hartwell facility.

In response to the COVID-19 pandemic, the Hartwell facility quickly implemented significant changes to improve safety and hygiene for all employees. This includes basic measures such as encouraging employees to wash their hands, making hand sanitizer and sanitary wipes available throughout the facility, and encouraging employees to stay home when feeling sick.

Nestlé Purina has implemented multiple advanced safety measures as well. These include increasing the cleaning routines for common areas such as break rooms. Every individual who enters the facility also completes a health and welfare check, which includes taking the person's temperatures. All employees and visitors are required to wear masks and maintain social distancing unless required to complete the employee's work. Employees are also assigned to zones in the facility so any potential exposure is limited to a group of employees.

Consistent with its work environment, Nestlé Purina is committed to completing a safe and healthy election process. The Company is prepared to offer the Region multiple options to conduct a manual election. Such setting may include a trailer outside the facility with a one-way entry and exit path. Any trailer may also be equipped with fans for increased ventilation and air circulation. This setting would be similar to that utilized by the Region when conducting a previous election at the Hartwell facility.

Alternatively, the Company is also able to offer a large outdoor space to conduct a manual ballot election. Nestlé Purina would rent a tent for protection from weather. Again, this setting would offer robust air circulation to minimize virus transmission risk. Additionally, such location presents greater privacy than any location within the interior of the Company's facility.

## **II. THE REGIONAL DIRECTOR SHOULD ADHERE TO THE PREFERRED MANUAL ELECTION VOTING PROCESS**

The Regional Director should reject the petitioner's request for a mail ballot election. Such request is inconsistent with the Board's favored manual election process to promote full and fair inclusion of unit eligible employees. Further, actual circumstances surrounding the Hartwell facility do not favor any deviation from the preferred manual election process. The Regional Director should proceed with a manual ballot election to obtain a representative survey of eligible employees.

### **A. The Board Favors Manual Elections and They Result in Greater Employee Participation**

The Board traditionally favors manual elections. The NLRB's Casehandling Manual specifically notes, "[t]he Board's longstanding policy is that representation elections should, as a general rule, be conducted manually." *NLRB Casehandling Manual* Section 11301.2. The *Outline of Law and Procedure In Representation Cases* further states that mail ballot elections occur, "if at all, in unusual circumstances." Section 22-110. This case does not present "unusual circumstances" that warrant deviating from a manual election.

An on-site election, as opposed to a mail ballot, creates greater percentage of employee participation than in mail ballot elections. The Office of the General Counsel observed in 2008 that over the course of 2006–2007, the participation rate in manual elections was 81.57%, as compared to approximately 65% in mail or mixed manual-mail ballot elections. *See* G.C. Memo 08-05 (April 17, 2008).

Recent data definitively and empirically demonstrate that mail ballot elections significantly diminish voter turnout. During the week of March 7 to 13, 2020, more than 93% of manual ballots had a participation rate above 80% — only two out of thirty elections (6.7% of manual elections) resulted in lower rates. *See Wainfleet Co.*, No. 03-RC-256434 (63% rate); *Growing Seeds at Crystal Springs, Inc.*, No. 19-RC-256529 (75% rate). However, from March 14 to June 9, Regional Directors exclusively ordered mail ballot elections and nearly 40% of elections had a participation rate of 80% or less.

During this pandemic, the reality of low-voter turnout in mail ballot elections has only worsened. COVID-19-related mail ballots have resulted in a nearly 600% increase in low-voter turnout compared to manual ballot elections. *See, e.g., Altec Industries, Inc.*, 10-RD-257071 (59%); *Paragon Sys., Inc.*, No. 09-RC-259023 (55%); *River Mkt. Comm. Co-op*, No. 18-RC-256986 (54%); *Univ. Protection Serv., LLC*, No. 10-RC-257846 (52%); *Triple Canopy, Inc.*, No. 27-RC-257463 (37%); *Am. Sec'y Programs, Inc.*, No. 05-RC-256696 (36%); *Children & Adult Disability Ed. Servs.*, No. 04-RC-256028 (40%), *TMW Contracting, LLC*, 10-RC-261728 (44%). And numerous reports of

service cutbacks and various problems with the US Postal Service portend ever more uncertainties about the efficacy of a mail ballot election.

Further, in *Fontanini Foods, LLC*, the Regional Director extended the mail ballot period ***twice*** because of low turnout. No. 13-RC-257636 (Reg'l Dir. June 29, 2020). In that case, the Region commingled the ballots and counted on June 17, 2020. However, after low turnout, the Regional Director extended the initial mail ballot period until July 1, 2020. The Regional Director then extended the period for a second time, until July 8, 2020, because only 227 of 401 (56.6%) mailed ballots had been returned as of June 29. Other issues also arose in that case, including: some employees had to pay to receive the NLRB package, missing ballots, duplicate ballots, and a few employees attempted to contact the NLRB but never heard back about ballot issues. Ultimately, the Region counted ballots and while it stated it received 227 ballots, the Region only counted 216. A manual election eliminates these concerns and best preserves the laboratory conditions for an election and the integrity of the voting process. Indeed, the Board has noted, “[m]ail ballot elections are more vulnerable to the destruction of laboratory conditions than are manual elections because of the absence of direct Board supervision over employees’ voting.” *Thompson Roofing, Inc.*, 291 NLRB 743 at n. 1 (1988).

**B. The Current Circumstances Do Not Meet the Board’s Established “Extraordinary Circumstances” Standard to Warrant a Mail Ballot**

The Region can easily conduct an in-person, manual election at the Hartwell Facility. A mail ballot is simply inappropriate. In *San Diego Gas & Electric*, the Board explained the “extraordinary circumstances” that might increase a Regional Director’s discretion to direct a mail ballot election. 325 NLRB 1143 (1998). Importantly, the Board explained that the “extraordinary circumstances” ***must directly relate*** to the issue of voter participation. *Id.* at 1144 (the “extraordinary circumstances” must “make it difficult to vote in a manual election” and mail ballot is ***only permissible*** where it would “enhance the opportunity for all to vote.”) (emphasis added).<sup>2</sup> The Board outlined these limited circumstances that may warrant use of mail ballots:

- (a) Where eligible voters are “scattered” because of their job duties over a wide geographic area;
- (b) Where eligible voters are “scattered” in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and
- (c) Where there is a strike, a lockout or picketing in progress.

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<sup>2</sup> For this reason, previous circumstances akin to the current environment did not result in a default entitlement to a mail ballot but, rather, a necessary delay to proceed with the Board’s preferred manual ballot format. See e.g., *Kanuai Coconut Beach Resort*, 317 NLRB No. 145 (1973)(election deferred until after hurricane); *A&B HVAC Servs., Inc.*, No. JD(NY)-44 13, 2013 WL 5305832, at \*1 (Sept. 19, 2013)(election postponed due to after effects of Hurricane Sandy).

*Id.* at 1145.

Here, none of the circumstances above exist. The voters all work at the same location and have overlapping schedules. These facts alone eviscerate both the first and second prongs of the *San Diego Gas & Electric* test. Finally, no strike, lockout or picketing is happening at the Hartwell Facility. The facts simply do not justify a mail ballot election and based off traditional mail ballot experience and recent COVID-19 mail ballot experience (both explained above), the Region must choose a manual election to optimize voter turnout ensure each vote is counted and maximize preservation of laboratory conditions.

**C. Hartwell, Georgia's COVID-19 Data Does Not Support Deviating from a Manual Election**

The low regional and local COVID-19 virus activity fully supports a manual election. Georgia is currently experiencing an overall decrease in COVID-19 virus activities. As of August 24, 2020, Georgia's seven-day average of new cases reported was down 30% compared to its peak one month earlier. Georgia Department of Public Health, DPH Provides Update on COVID-19 Trends in Georgia, <https://dph.georgia.gov/press-releases/2020-08-24/dph-provides-update-covid-19-trends-georgia> (last accessed September 3, 2020). As of August 31, 2020, the estimated rate of transmission in Georgia was in the lowest third of the country at .94. Statista, Average number of people who become infected by an infectious person with COVID-19 in the U.S. as of August 31, 2020, by state, <https://www.statista.com/statistics/1119412/covid-19-transmission-rate-us-by-state/> (last accessed September 3, 2020).

Data for the local area surrounding the Hartwell facility demonstrates even safer circumstances. According to COVID-19 data published by the state of Georgia, the Hartwell facility resides in one of the least infected counties in all of Georgia. The Hartwell facility resides in Hart County, Georgia. As of September 8, 2020, Hart County experienced a seven-day rolling average of just 4.1 cases per day in the entire county. Georgia Department of Public Health, Daily Status Report, <https://dph.georgia.gov/covid-19-daily-status-report> (last accessed Sept. 8, 2020). Over the last two weeks, just 55 individuals tested positive for the virus in Hart County. *Id.* These statistics demonstrate the virus is actively diminishing in the regional and local area where a manual ballot election will safely take place.

**D. The Pandemic Does Not Warrant Deviating from Established Standards to Conduct A Mail Ballot**

While the COVID-19 pandemic may create additional considerations and require some additional precautions, the pandemic alone does not justify deviating from decades of agency preference and practice. On July 6, 2020, General Counsel Peter Robb issued GC 20-10 that outlined "how to best to conduct manual elections safely and efficiently in this unprecedented environment." Indeed, the Board no longer automatically approves of mail ballot elections under the current virus circumstances. *Aspirus Keweenaw*, 370 NLRB No. 13 (Aug. 25, 2020). ***The Hartwell Facility Voting Location Options allow the Region to conduct an election that meets all the election mechanics listed in Sections 1 and 4 of GC 20-10. The Company commits to meeting all those election***

*mechanics outlined in Sections 1 and 4. Similarly, the Company will comply with Sections 2 and 3 of GC 20-10.*

Based on the facts above, Nestlé Purina proposes the following type, date, times and location for the election:

<b>Type</b>	Manual, Secret Ballot
<b>Date</b>	October 2, 2020
<b>Times</b>	6:00 a.m. – 8:00 a.m. and 6:00 p.m. – 8:00 p.m.
<b>Location</b>	Trailer or Outdoor Tent Near the Main Entrance Parking Area

Conducting such an election would protect the integrity of the election process by maximizing voter turnout while allowing a safe environment for participants.

### **III. THE APPROPRIATE UNIT INCLUDES ALL PRODUCTION AND WAREHOUSE EMPLOYEES AT THE HARTWELL FACILITY**

The Regional Director should conduct an election that include all production and warehouse employees at the Hartwell facility in the voting unit. The petitioned for unit of “Distribution Employees” is impermissibly narrow under the Board’s compelling precedent in *PCC Structural, Inc.*, 365 NLRB No. 160 (2017) and *The Boeing Company*, 368 NLRB No. 67 (2019). The circumstances of employment at the Hartwell facility make clear that all production and warehouse employees share a strong community of interests.

#### **A. The Regional Director Must Evaluate the Unit of Employees Under the Board’s Traditional Community of Interest Standard**

In *PCC Structural, Inc.*, 365 NLRB No. 160 (2017), the Board clarified the correct standard for determining whether a proposed bargaining unit is an appropriate unit for collective bargaining when the employer contends that the smallest appropriate unit must include additional employees. To assess the appropriate scope of a voting unit, the Board applies a multi-factor framework that assesses:

whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including an inquiry into the amount and type of overlap between classifications; are functionally integrated with the employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

*Id.* at 5 (citing *United Operations*, 338 NLRB 123 (2002) and *Wheeling Island Gaming*, 355 NLRB 637 (2010)). The *PCC Structural* analysis requires consideration of all employees, including those

outside the petitioned-for bargaining unit. *Id.* at 6-8. Indeed, the Regional Director's obligation to decide the proper unit in each case cannot be overstated, as it is critical to "ensuring to employees their rights to self-organization and freedom of choice in collective bargaining and fostering industrial peace and stability through collective bargaining." *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962) (outlining the community of interest factors to be considered and noting that "if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.").

When evaluating the proper scope of a voting unit, the Regional Director cannot limit its evaluation to only those employees raised in the petitioner's petition. *Id.* If the petitioner establishes that the employees in the petitioned-for unit share a community of interest with each other, then the Regional Director must also determine whether the petitioner has shown that "excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members." *Id.*, at 11 (quoting *Constellation Brands*, 842 F.3d at 794). However, at no point in this analysis does the burden shift to the employer to show that a broader unit shares a heightened community of interest with employees in the petitioned-for unit. *Id.*

Even if the petitioner demonstrates distinct differences among groups of employees raised by the employer as constituting the appropriate voting unit, those differences do not act to isolate employees into separate bargaining units where the community of interest factors establish similarities among these groups of employees that are sufficient to weigh against those differences. *See Berea Publishing Co.*, 140 NLRB 516, 528 (1963). The Board's long-held view is that "organization by department or classification of department is not favored." *American Publishing Company of Michigan*, 308 NLRB 563 (1992) (citing *Airco, Inc.*, 273 NLRB 348 (1984)). The Board's purpose in determining what unit constitutes an appropriate unit was intended by Congress "to prevent fragmentation of appropriate units into smaller inappropriate units." *Overnite Transportation Co.*, 322 NLRB 723, 725 (1996). To this end, the Board holds that the ultimate determination is "whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit." *The Boeing Co.*, 368 NLRB No. 67 (2019) (quoting *Wheeling Island Gaming*, 355 NLRB 637, 637, n.2 (2010)).

In a manufacturing setting, the Board has consistently determined that the appropriate unit scope consists of a broad scope of hourly employees under one facility. Under the Board's traditional community of interest analysis upheld in *PCC Structurals*, the Board rejected an attempt to establish a separate unit of facility mechanics because "the mechanics work close to, and share common benefits with, production workers, perform duties which are integral part of the production process, and do not possess a high level of skills . . . ." *Peterson/Puritan, Inc.*, 240 NLRB 1051 (1979). *See also Chromalloy Photographic*, 234 NLRB 1046 (1978) (finding separate unit of camera repair and maintenance department employees in photography plan inappropriate where employee's skill level did not vary greatly and there was no formal training or apprenticeship program). Likewise, the Board has repeatedly rejected attempts to parse out maintenance employees from an appropriate unit consisting of production and maintenance employees. *TDK Ferrites Corp.*, 342 NLRB 1006 (2004), *Buckhorn, Inc.*, 343 NLRB 201 (2004), *F&M Schaefer Brewing Co.*, 198 NLRB 323 (1972).



Our research has revealed no case in which, over objection of the employer, the Board approved of a warehouse employee-only unit and that excluded production employees in a factory setting. The fragmented micro-unit sought by petitioner would be unprecedented.

**B. Distribution Employees Share a Strong Community of Interest with Production and Warehouse Employees at the Hartwell Facility**

Applying the traditional community of interest factors to the Hartwell facility employees, it is clear that the smallest appropriate unit consists of all production and warehouse employees. The Regional Director cannot limit the analysis of the appropriate voting unit to merely that raised in the petition. Rather, the Regional Director must consider all employees, including those outside the petitioned-for unit. In light of the long list of common interests between production and warehouse employees, the Regional Director should certify an election that includes all of these employees in the voting unit.

**1. Separate Departments**

The Company's use of warehouse as a department designation is nomenclature that does not represent separate, unrelated activities operating in separate silos. As explained below, warehouse employees' work duties are connected to the work of production employees, and vice versa, and the two are mutually dependent. To sell pet food, the Company needs to implement three stages of activity at the factory: 1) bring work in progress materials and packaging to the production line; 2) run them through the production equipment to turn them into finished product in packages, and 3) bring the packaged, finished products to trucks for shipping to customers. In a general sense, warehouse employees perform the first and last steps of that process, and production employees perform the middle step. They are interdependent. Production cannot operate without warehouse employees completing the first step, and then warehouse employees cannot load trucks to ship out packaged product until production employees complete the second step. The one relies on the other, and then the other relies on the one. This is a continuous circle of interdependent activities that must work efficiently for the Company to control costs sufficiently to earn a sustainable profit.

**2. Skills and Training**

Nestlé Purina's production and warehouse employees possess similar skills and undergo similar training to begin employment with the Company. Production and warehouse employees share a common set of basic qualifications because Nestlé Purina requires employees in both positions to hold a high school diploma or GED. After the employment relationship begins, all production and warehouse employees undergo the same basic onboarding process and safety training. Further, the personal protective equipment utilized by production and warehouse employees on a daily basis is the same.

Throughout employment, production and warehouse employees prove to be interchangeable in their skills and abilities. Warehouse employees are frequently assigned to assist production with hand feeding work in progress materials into production equipment. Likewise, warehouse employees have trained production employees in forklift operation. Indeed, the common skills between positions is evidenced by the fact that Nestlé Purina typically recruits internally to draw its production personnel

from existing warehouse employees. Six employees have transferred from warehouse positions to production since the Company began production activities at the Hartwell facility.

### 3. Terms and Conditions of Employment

Production and warehouse employees are subject to the same terms and conditions of employment, which also demonstrates a high level of shared interests among these employees. Nestlé Purina's employee handbook policies apply equally to all production and warehouse employees. All employees are subject to the same:

- attendance policy
- job transfer and assignment
- code of conduct
- corrective action and appeal process
- overtime pay
- holidays
- vacation and paid time off accrual

Additionally, the pay and benefits for the employees are substantially the same. In fact, production and warehouse employees enjoy the exact same health and welfare benefits, and the exact same retirement benefits. The jobs offer the same starting pay, and there is little difference in pay rates.

### 4. Supervision

Production and warehouse employees also share similar interests in their common management structure. All production and warehouse employees report to the same Factory Leadership Team at the Hartwell facility. This reporting structure culminates in the same Factory Manager who oversees both production and warehouse employees. Likewise, the same quality, safety, and human resources management personnel oversee and support all production and warehouse employees. These management employees convey consistent communications to and hold regular meetings with production and warehouse personnel collectively. This factor weighs in favor of a unit consisting of production and warehouse employees at the Hartwell facility.

### 5. Functional Integration

Nestlé Purina operates an integrated manufacturing process that supports inclusion of production and warehouse employees in the same unit. Production and warehouse employees work together from the beginning of production to the conclusion of product shipment outside the Hartwell facility. Warehouse employees assist production employees to retrieve work in progress materials that are necessary to begin the product creation process at the Hartwell facility. Once the product is created, warehouse employees again work with production personnel to transfer the completed product so that it may be shipped outside the facility. As mentioned above, until warehouse employees complete their "inbound" work, the production employees cannot do their work. Then, until the production employees run the equipment to produce and package finished product, the warehouse

employees cannot do their outbound work. It is all interconnected and mutually dependent. This highly integrated process strongly favors inclusion of all employees in the same unit.

#### 6. Interchange and Job Functions

Nestlé Purina's interchange between production and warehouse employees also supports a broader unit. The Company relies on warehouse employees to provide additional assistance with production when needed by hand feeding product into manufacturing machines. Likewise, warehouse employees conduct forklift training with production employees so the latter may be certified in safe forklift operation and able to use that machinery when needed. This high degree of overlap favors inclusion of production and warehouse employees in the same unit.

The current plans for this young facility include the expansion of the "variety pack" process whereby customized loads of unique mixes of the different products are created and flavors added. These products currently make up approximately 20% of the Hartwell facility's volume and this is expected to multiple by two to three times over the coming two to three years. The variety pack work in particular involves an extra level of interaction between warehouse and production employees. Warehouse employees directly work on the variety pack equipment when additional assistance is needed. Moreover, the variety pack equipment is located in a central area of the facility where production and warehouse employees intermingle.

#### IV. CONCLUSION

In light of the important considerations listed above, the Board should direct a manual election in the present case because the Region can conduct such an election that optimizes voter turnout while protecting the safety of all those involved. No circumstances either justify or require the use of mail ballots. The Regional Director will confidently carry out a safe manual election process that promotes the democratic inclusion of all voting-eligible employees and ensures a representative result is reached.

Moreover, the Regional Director should include production and warehouse employees in the same voting unit. The high degree of shared interest among these employees strongly favors a broad unit at the Hartwell facility. A fractured unit consisting of only warehouse employees would constitute an impermissible micro-unit of employees. Thus, voting employees should include production and warehouse personnel alike.

Sincerely,



Bernard J. Bobber

BJB:jrd

Scott C. Thompson  
September 9, 2020  
Page 12

cc: Bakery, Confectionary, Tobacco Workers and Grain Millers Local Union 42  
(via e-mail, with Statement of Position, Voter List of Petitioned-for Employees, and Voter  
List of Appropriate Unit Employees))

# **Attachment B**

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10

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CASE NO. 10-RC-265325

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NESTLÉ PURINA PETCARE COMPANY

Employer,

and

BAKERY, CONFECTIONARY, TOBACCO  
WORKERS AND GRAIN MILLERS  
UNION LOCAL 42

Petitioner

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**POST-HEARING BRIEF OF NESTLÉ PURINA PETCARE COMPANY**

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Prepared by:

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A handwritten signature in blue ink, appearing to read "Bernard J. Bobber".

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UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10

NESTLÉ PURINA PETCARE COMPANY

Employer

and

BAKERY, CONFECTIONARY, TOBACCO  
WORKERS AND GRAIN MILLERS  
UNION LOCAL 42

Petitioner

CASE NO. 10-RC-265325

**EMPLOYER’S POST-HEARING BRIEF**

The instant case presents two issues for the Regional Director:

1. Whether production and warehouse employees who work next to each other in an integrated manufacturing facility constitute the smallest appropriate voting unit because of their strongly shared community of interest.
2. Whether Petitioner demonstrates “extraordinary circumstances” to support departure from a standard manual ballot election when the Employer’s facility is located in a local area with low pandemic activity and employees have not experienced any COVID-19 cases attributable to the work environment.

Region 10 of the National Labor Relations Board (the “Region”) should reject the Bakery, Confectionary, Tobacco Workers and Grain Millers Union Local 42’s (“Petitioner”) attempt to deviate from the preferred, standard Board practice that supports conducting a manual ballot election with a voting unit consisting of production and warehouse employees at the Hartwell, Georgia factory of Nestlé Purina Petcare Company’s (“Nestlé Purina” or the “Employer”). Production and warehouse employees share a substantial community of interest that makes the smallest appropriate unit inclusive of all these workers. These employees all work under the same terms and conditions of employment that include the same or similar qualifications, training, safety

equipment, work schedule and employment policies. They complete their job duties and responsibilities in an integrated manufacturing environment for which they are each dependent on each other to complete their daily duties and responsibilities.

Petitioner seeks an extraordinary departure from the standard treatment of production and warehouse employees within a single unit by fracturing these workers so that warehouse employees stand in isolation. This attempt to divide warehouse employees in an integrated manufacturing facility from the production employees is not only extraordinary and rare, it is entirely unprecedented. There is no evidence in the record of any such fractured warehouse unit in a factory, anywhere. Certainly, no Purina factory has warehouse employees in a unit that excludes the production employees, or vice versa. The Petitioner failed to identify any such fracture unit that it represents. And we can find no Board case throughout the entire history of the Act that, over objection, approved at a factory a warehouse employee unit that excluded production employees in that same factory, or vice versa. The Region should reject Petitioner's unprecedented attempt to deviate from standard practices in the manufacturing industry, and order that the voting unit must include all production and warehouse personnel.

Likewise, the Region should follow its standard practice and hold a manual ballot election. Board law strongly supports conducting a manual ballot election unless the Petitioner can demonstrate "extraordinary circumstances" compel an alternative voting method. *San Diego Gas & Electric*, 325 NLRB 1143 (1998). Nestlé Purina's factory sits in Hartwell, Georgia, a rural area with low virus activity. Conditions have dramatically improved over the past few months. Employees at the Hartwell facility experienced few cases of COVID-19, all of which are attributable to personal activities outside of work, and the evidence showed zero cases of COVID-19 infection occurring at the factory. Nestlé Purina provides a safe and healthy work environment

for employees each day, and it will provide the same safe voting environment for employees and the Region.

## **I. STATEMENT OF THE CASE**

On August 27, 2020, Petitioner filed a representation petition seeking certification as the collective bargaining representative in the following unit:

Included: All full time and part time Distribution Employees

Excluded: All other employees, temporary, professional, office clerical, managers, guards, supervisors

The Region conducted a Pre-Election Hearing on September 22, 2020. At the Pre-Election Hearing, the parties disputed the scope of the petitioned-for unit. Nestlé Purina contends that the only appropriate unit must include all production and warehouse (referred to in the petition as “Distribution”) employees.

Additionally, the parties also disputed the method of election. Nestlé Purina contends that the Region should conduct an election by standard manual ballot. The Petitioner requests the Region conduct an election by mail ballot.

## **II. SUMMARY OF ARGUMENT**

The petitioned-for unit is not an appropriate unit because it seeks to exclude production employees who share a close and substantial community of interest with warehouse employees. The employees Nestlé Purina seeks to add to the Petitioner’s proposed unit meet the “community of interest” standard reestablished by the Board in *PCC Structural, Inc.*, 365 NLRB No. 160 (2017) and affirmed in *The Boeing Company*, 368 NLRB No. 67 (2019). The strong similarities vastly outweigh any distinctions that might be drawn between these employees and compel the conclusion that the smallest appropriate unit consists of both production and warehouse employees. To do otherwise would be unprecedented, blazing a new trail in permitting the extent

of organization to fracture employees in an integrated manufacturing facility (in violation of Section 9(b) of the Act).

The Region should also reject Petitioner's request to conduct the voting by mail ballot because the Region can easily conduct a safe, free, and fair manual ballot election. The Board favors manual ballot elections and precedent limits the instances when an alternative may be considered due to "extraordinary circumstances" relating to the unavailability of the voters. The necessary conditions to grant an exception to the manual ballot process are not present here. Petitioner relies on hypothetical concerns over the handling of paper ballots that are unsupported by current science concerning disease transmission. (Besides, a mail ballot would be handled by more people than would be the manual ballot.) The county within which the Hartwell facility is located, Hart County, is experiencing low virus activity. Moreover, Nestlé Purina will provide a voting environment that meets and exceeds all of the suggested protocols identified by the NLRB General Counsel. Employees have not experienced any COVID-19 cases attributable to the Hartwell facility. The Region can confidently conduct a standard manual ballot election that minimizes risk to employees' and the Board Agent's safety and health.

### **III. STATEMENT OF FACTS**

#### **A. Nestlé Purina's Hartwell, Georgia Facility**

Nestlé Purina is a worldwide leader in pet product manufacturing. The Company manufactures three different categories or groups of pet products, which include litter, wet pet food, and dry pet food and treats. (Tr. 18.) There are twenty-one (21) Nestlé Purina factories in the United States, with approximately 8,000 employees in total. (Tr. 18.)

Nestlé Purina's Hartwell, Georgia facility (the "Hartwell facility") is the Employer's latest wet pet food manufacturing location. The Hartwell facility opened in 2018 and subsequently began producing wet pet food that includes Fancy Feast brand three ounce cans. (Tr. 20.) At the time of

hearing, the Hartwell facility employs approximately 52 hourly, warehouse employees and 154 hourly, production employees. (Tr. 30, 37.)

**B. Production and Warehouse Employees Regularly Interact and Work Together to Manufacture Nestlé Purina’s Pet Food Products**

1. Production and Warehouse Employees’ Interconnected Jobs

Warehouse employees at the Hartwell facility fulfill multiple functions, including loading trucks, unloading trucks, case pick, and line haul. (Tr. 32-33.) Production and warehouse employees interact when warehouse employees complete the line haul task. (Tr. 33.) A warehouse employee completing line haul work directly pulls products off the production line and takes them to the warehouse. (Tr. 33.) Additionally, warehouse employees review product for potential quality issues and alert production team members to any issues they identify, such as with product labelling. (Tr. 35.) Warehouse employees rotate this task so that each person completes it at least once every two weeks. (Tr. 33-34, Employer Hearing Exhibit (“Employer Ex.”) 15.) Nestlé Purina expects that the need for warehouse employees to complete this work will increase in the near future because production capacity in this new factory continues to expand. (Tr. 36.)

Production employees are also highly connected to warehouse employee work. Production employees receive ingredients and run the Hartwell facility production lines and batching (or “kitchen”) lines. (Tr. 39) Production employees must safely operate production equipment, including fork truck, packing lines, and processing equipment. (Employer Ex. 13.) Prior to moving pallets, warehouse employees perform quality checks to ensure products meet Nestlé Purina’s specifications. (Tr. 39, 52.) In sum, production employees create the products that warehouse employees move at the Hartwell facility. For the factory to operate, the work of each depends on and interacts with the works of the other.



To complete their job duties and responsibilities, production employees become certified to operate forklifts at the Hartwell facility. (Tr. 37-38.) Warehouse employees train and certify those production employees who are not forklift certified at the outset of employment with Nestlé Purina. (Tr. 40.) Additionally, all employees, production and warehouse alike, undergo forklift re-training if they are involved in an “impact” event involving the forklift making contact with another object. (Tr. 40-41.) Warehouse employees complete forklift re-training with production employees following such impact events. (Tr. 40-41.)

A small group of employees on Nestlé Purina’s specialty packaging line, known as “Variety Pack,” located in a central area of the Hartwell facility integrate with both production and warehouse employees. (Tr. 17, 25.) The Variety Pack area is located in a central part of the continuous Hartwell facility, abutting both the production lines and the warehouse. (Tr. 25, 27, Employer Ex. 6 (area marked “02”).) Variety Pack employees work alongside production and warehouse employees and are considered to be production employees. (Tr. 42-43.) Variety Pack employees take individual wet food products and feed them into a line of equipment that places those products into unique cases. (Tr. 42-43.) When cases are completed, Variety Pack employees transport the cases to the warehouse by forklift. (Tr. 42-43.) Nestlé Purina has assigned warehouse and production employees to the Variety Pack area to assist with handfeeding product into the equipment. (Tr. 49, 83.) Additionally, Warehouse supervisors have had supervisory responsibility of Variety Pack employees. (Tr. 43.) Cy Gilbreth, the factory’s Supply Chain Manager,<sup>1</sup> has responsibility for the warehouse operation and this Variety Pack operation. (Tr. 16.)

Variety Pack employees share significant skills, duties, and responsibilities with warehouse employees. Petitioner concedes that Variety Pack employees are properly classified as production

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<sup>1</sup> Petitioner’s Exhibit 7 also describes Mr. Gilbreth’s job title as Logistics Manager.

employees within the Hartwell facility. Both Variety Pack and warehouse employees' work overlaps in significant ways, including, but not limited to:

- Safety training, including lock-out, tag-out processes (Tr. 116-17, 163-65, Employer Ex. 16, at 3, 7, 11, 16);
- Safety equipment consisting of a uniform, protective footwear, and eye protection (Tr. 59, 66, Employer Ex. 16, at 7, 11, 14, 16);
- Use and maintenance of forklifts and clamp trucks to move pallets throughout the Hartwell facility, including the warehouse (Tr. 41-42, Employer Ex. 16, at 8, 9, 17, 20);
- Evaluate finished products to ensure they are free of defects and coded correctly (Tr. 126-27, Employer Ex. 16, at 16);
- Understand the layout of the warehouse and applicable warehouse processes (Employer Ex. 16, at 19);

Warehouse and Variety Pack employees are interchangeable to such a significant degree that Nestlé Purina has assigned warehouse and production employees to the Variety Pack area to assist with completing the Variety Pack line processes. (Tr. 49, 83.)

2. Production and Warehouse Employees Experience a Similar Application, Hiring, and Onboarding Process

Production and warehouse jobs maintain similar qualification requirements. (Tr. 55-56.) Both positions require the individual to possess a high school diploma or GED. (Tr. 55, Employer Exs. 12, 13.) Candidates for both production and warehouse jobs must also possess experience in a manufacturing or similar environment to be considered for employment. (Exs. 12, 13.)

Production and warehouse employees undergo the same hiring process with Nestlé Purina. During the interview process, Nestlé Purina covers similar information concerning scheduling, training, job rotations, pay progression, benefits, and paid time off with each individual, regardless of whether they are applying for a production or warehouse position. (Tr. 56-57, Employer Ex. 10.)

Once hired, production and warehouse employees receive the same or similar compensation and identical benefits packages. Production and warehouse employees' wage rates each begin at \$20.60 per hour. (Employer Ex. 10.) Moreover, the second and third level of progression steps for both positions is also identical – \$21.63 per hour and \$22.66 per hour. (*Id.*) Warehouse employees are not eligible for higher wage progression steps, while production employees may increase their pay two additional progression steps to \$23.69 per hour and \$24.72 per hour. (*Id.*) Thus, to earn a higher hourly rate, warehouse employees can and do transfer to production jobs. (Tr. 64-65.)

All of these employees are eligible for performance incentive bonuses, the majority of which is determined by facility-wide performance that impacts everyone's incentive pay equally. (Tr. 72-73.) Nestlé Purina provides production and warehouse employees the same options for health care plans, along with the same short-term disability, long-term disability, and accidental death and dismemberment insurance benefits. (Tr. 81, Employer Ex. 8.) Further, production and warehouse employees are eligible to participate in the same retirement savings plan. (Tr. 81, Employer Ex. 9.)

Nestlé Purina schedules production and warehouse employees to work the same schedule because their jobs are interdependent on each other. (Tr. 31.) That is, warehouse employees are unable to complete their jobs without production running to make products for warehouse employees to move. (Tr. 32.) Vice versa, production employees are not able to work unless warehouse employees are available to move products. (Tr. 32.) Thus, production and warehouse employees maintain the same work schedule. (Tr. 31-32.) Employees work 12-hour days with 36 hours in one workweek and 48 hours in the second workweek. (Tr. 31.) Nestlé Purina assigns specific individual schedules by reference to a team color. (Tr. 31-32, Employer Ex. 14.)

Production and warehouse employees also use identical computer equipment to access work-related information. Nestlé Purina makes computers available to employees throughout the Hartwell facility. (Tr. 76.) On these computers, production and warehouse employees can complete safety trainings, review their pay stubs, monitor their 401(k) accounts, and check their remaining paid time off. (Tr. 76.) Production and warehouse employees use these same tools in the same manner and for the same purposes.

3. Production and Warehouse Employees Report to the Same Leadership Team

Identical individuals serve as the management of the Hartwell facility's production and warehouse employees. Winston Silva, Nestlé Purina's Factory Manager, oversees the entirety of the Hartwell facility. (Tr. 31, Petitioner Exhibit ("Petitioner Ex.") 7.) Cy Gilbreth serves as Nestlé Purina's Supply Chain Manager and oversees the warehouse, production scheduling, materials purchasing, and the Variety Pack division. (Tr. 15-16.) Mr. Gilbreth's job duties and responsibilities include overseeing the Hartwell facility warehouse, production scheduling, and materials purchasing. (Tr. 15-16.)

Moreover, other facility departments apply universally to production and warehouse employees alike. The Hartwell facility's Safety Manager is responsible for designing and implementing safety requirements that apply to both production and warehouse employees. (Tr. 73-74, Petitioner Ex. 7.) Similarly, quality management, responsible for product quality, are responsible for both the work done by both production and warehouse employees. (Tr. 74-75, Petitioner Ex. 7.) And human resources personnel, managing employee relationships, are the same for both production and warehouse employees. (Tr. 75, Petitioner Ex. 7.)

4. Production and Warehouse Employees Are Subject to Identical Employment Policies

The same handbook policies apply to both production and warehouse employees at the Hartwell facility. (Tr. 59-60.) Employees receive a copy of Nestlé Purina's handbook during the first week of orientation. (Tr. 59-60.) Further, Nestlé Purina maintains employment policies that apply identically to warehouse and production employees. These policies include:

- Absenteeism/Tardiness (Tr. 62, Employer Ex. 2A),
- Overtime Distribution (Tr. 63, Employer Ex. 2B, at 7-8),
- Flexible Work (Tr. 63-64, Employer Ex. 2C),
- Job Transfer and Assignment (Tr. 64-65, Employer Ex. 2D),
- Vacation Scheduling (Tr. 65, Employer Ex. 2E),
- Workplace Apparel Guidelines (Tr. 66, Employer Ex. 2F),
- Holidays (Tr. 66-67, Employer Ex. 2G),
- Floating Holidays (Tr. 67, Employer Ex. 2H),
- Workplace Violence (Tr. 67-68, Employer Ex. 2I),
- Rules of Conduct (Tr. 68, Employer Ex. 2J),
- Smoke Free Policy (Tr. 68, Employer Ex. 2K),
- Fraternization (Tr. 68, Employer Ex. 2L),
- Disciplinary Guidelines (Tr. 68-69, Employer Ex. 2M),
- Personal Automobile Insurance Coverage for Company Business (Tr. 69, Employer Ex. 2N),
- New Hire Orientation Checklist (Tr. 69, Employer Ex. 2O),
- Drug and Alcohol Testing Procedures (Tr. 69-70, Employer Ex. 2P),
- Weekly Training Performance and Development (Tr. 70, Employer Ex. 2Q),
- Flexible Work Schedule Request (Tr. 70, Employer Ex. 2R),
- Dogs in the Workplace (Tr. 71, Employer Ex. 2S),
- Policy Against Discrimination and Harassment (Tr. 78, Employer Ex. 3),
- No-Retaliation Policy (Tr. 79, Employer Ex. 4),
- Equal Employment Opportunity & Affirmative Action Policies (Tr. 79-80, Employer Ex. 5), and
- Non-Exempt Time Reporting (Tr. 77-78, Employer Ex. 7).

There are no differences in how Nestlé Purina interprets or applies these policies between production and warehouse employees. (Tr. 59-78.) This unified system drives the Nestlé Purina “one team” approach that encourages warehouse and production employees alike to identify areas for improvement, safety, and similar interests. (Tr. 60-61, Employer Ex. 1, at 4.) To further promote the one team approach, the Hartwell facility practices an “open floor” environment that minimizes closed office space and encourages employees to approach any person in management with individual concerns. (Tr. 60-61.) That is, any warehouse or production employee can similarly raise issues and concerns with Mr. Saunders, Mr. Gilbreth, or Mr. Silva. (Tr. 61-62.)

Any updates to policies and practices that Nestlé Purina communicates to its workforce occur in settings consisting of group town hall meetings where production and warehouse employees attend together. (Tr. 75-76.) Since March 2020, Nestlé Purina has taken safety and health precautions that include holding these meetings with smaller groups of individuals. (Tr. 75-76.) However, they continue to consist of groups where production and warehouse employees participate together. (Tr. 75-76.)

### **C. Nestlé Purina’s Imminent Expansion Further Integrates Production and Warehouse Employees**

The Hartwell facility is new to the Nestlé Purina family and is undergoing significant changes to increase the similarities in experience that production and warehouse employees will share on a daily basis. These changes include exterior and interior modifications to employee common areas like the employee parking area, facility entrance, break rooms, and locker rooms.

#### **1. Parking Lot and Entrance**

Employees will use the same parking lot to park their vehicles while at work rather than the separate parking lots they currently utilize. (Tr. 23-24.) Nestlé Purina will break ground on a

new facility that will move all parking to a single site in October 2020. (Tr. 23-24.)<sup>2</sup> Additionally, the single parking site will coincide with all employees entering the facility at the same entrance point. (Tr. 24-25.) Warehouse employees will then travel through the production area for work each day. (Tr. 24-25.)

## 2. Break Rooms and Locker Rooms

Employees will also soon share similar space with respect to break rooms and locker rooms as a result of Nestlé Purina's imminent changes to the Hartwell facility. A break room or cafeteria will be located in the warehouse and shared with production lines 4, 5, and 6. (Tr. 29-30.) Additionally, all production and warehouse employees will share the same locker room area. (Tr. 27.)

### **D. Nestlé Purina's Exceptional COVID-19 Safety Record**

The Hartwell facility implemented extensive policies and equipment to protect employees that have resulted in no employees who have contracted the COVID-19 at work. (Tr. 132.) These practices include daily temperature screening and questioning upon entry into the Hartwell facility. (Tr. 83-84.) If an employee shows an elevated temperature or answers negatively to any question, Nestlé Purina sends the employee home to quarantine. (Tr. 83-84.) Once inside, Nestlé Purina has retained a third-party vendor to regularly and extensively clean the facility. (Tr. 84.) Employees share in the responsibility to maintain a clean environment by cleaning their equipment after each use. (Tr. 84-85.) All employees also wear masks at all times. (Tr. 85.) The only exceptions are for employees operating a forklift, because they are required to maintain ten feet of distance with other employees as a separate safety rule, and employees sitting at a desk with nobody else in their area.

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<sup>2</sup> At the time of hearing, employees park in one of two parking lots. (Tr. 22-23.)

(Tr. 85-86.) As a result of these precautions and practices, no employee has contracted COVID-19 at work. (Tr. 132.)

#### **IV. ARGUMENT**

##### **A. The Appropriate Voting Unit Consists of Production and Warehouse Employees**

The National Labor Relations Act (the “Act”) requires that the National Labor Relations Board (the “Board”) conduct an election of “an appropriate unit” of employees. *The Boeing Company*, 337 NLRB 152 (2001). Section 9(b) of the Act provides the only statutory guidance to evaluate an “appropriate unit” for an election: “the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof.” 28 U.S.C. § 159(b). The extent to which employees have organized is not controlling to determine whether a unit is appropriate for election. § 159(c)(5).

To determine whether a unit is appropriate for an election, the Board applies its traditional community of interest test to determine “whether the employees in a petitioned-for group share a community of interest sufficiently distinct from the interests of employees excluded from the petitioned-for group to warrant a finding that the proposed group constitutes a separate appropriate unit.” *PCC Structural, Inc.*, 365 NLRB No. 160 (2017) (“[T]he Board, when determining unit appropriateness, is not constrained by whether or not an ‘overwhelming’ community of interest exists between petitioned-for employees and those excluded from that unit.”)

The traditional community of interest standard, to which the Board returned in *PCC Structural*, was originally set forth in *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962) and further outlined in *In re United Operations, Inc.*, 338 NLRB 123 (2002). The Board enumerated the following factors to be assessed in determining whether a community-of-interest sets a group of employees apart from other employees:



1. a difference in method of wages or compensation;
2. different hours of work;
3. different employee benefits;
4. separate supervision;
5. the degree of dissimilar qualifications, training, and skills;
6. differences in job functions and amount of working time spent away from;
7. the employment or plant sites;
8. the infrequency or lack of contact with other employees;
9. lack of integration with the work functions of other employees or
10. interchange with them; and
11. history of bargaining.

*Kalamazoo Paper Box Corp.*, 136 NLRB at 137.

The Board recently clarified that the traditional community of interest standard reestablished by *PCC Structural*s applies a three-step process to determine an appropriate bargaining unit:

First, the proposed unit must share an internal community of interest.

Second, the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed.

Third, consideration must be given to the Board's decisions on appropriate units in the particular industry involved.

*The Boeing Co.*, 368 NLRB No. 67 (2019).<sup>3</sup>

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<sup>3</sup> Nestle Purina does not dispute that the warehouse employees share an internal community of interest under the first step of *The Boeing Co.* analysis. As explained below, the second and third steps of *The Boeing Co.* traditional community of interest analysis conclusively demonstrates the Region should include production and warehouse employees in the same unit.

Moreover, “the Board does not approve fractured units, i.e., combinations of employees that are too narrow in scope or that have no rational basis.” *Seaboard Marine, Ltd.*, 327 NLRB 556 (1999) (citing *Colorado Nat’l Bank of Denver*, 204 NLRB 243 (1973)). A fractured unit occurs when:

- A petitioned-for unit arbitrarily excludes certain classifications,
- lacks a distinctive community-of-interest from the excluded employees, or
- is too narrow in scope.

*Id.* A petitioned-for unit of employees is inappropriate where the employees “do not share a sufficiently distinct community of interest from other employees to warrant a separate unit and, therefore, that the unit grouping sought by the Petitioner is an arbitrary one.” *Id.* (citing *Brand Precision Servs.*, 313 NLRB 657 (1994); *Transerv Sys.*, 311 NLRB 766 (1993)).

Under the applicable community of interest standard, it is clear that the petitioned-for unit consisting of warehouse employees and excluding production employees is not an appropriate bargaining unit. Rather, the Region should order an election of a unit including both production and warehouse employees who share a community of interest under *PCC Structural*s, as clarified by *The Boeing Co.*

1. Production and Warehouse Employees Share Identical Hours of Work, Identical Benefits, and Identical Employment Site

The vast majority, if not total, of the *Kalamazoo Paper Box Corp.* community of interest factors strongly weigh in favor of including production employees in the voting unit. Indeed, under the second (hours of work), third (employee benefits) and seventh (employment or plant sites) factors, production and warehouse employees share completely identical interests.

Specifically, production and warehouse employees share the same shifts across the Hartwell facility. *Supra*, Sect. III.B.2. These shifts consist of 12-hour days, with rotating two-day

shifts and four night shifts. *Id.* In one workweek production and warehouse employees alike work 36 hours, followed by a workweek of 48 hours. *Id.* Nestlé Purina schedules production and warehouse employees in this identical manner because of the continuous nature of its operation. *Id.*

Additionally, production and warehouse employees receive the same employee benefits. These benefits include health insurance, disability insurance, and retirement investment accounts. *Id.* Although employees may choose different options, production and warehouse employees share the same opportunities for benefits. *Id.* To monitor and review these benefits, and other employee information, production and warehouse employees enjoy access to the same computer equipment throughout the Hartwell facility.

Similarly, paid leave benefits are also identical for production and warehouse employees at the Hartwell facility. Both production and warehouse employees receive the same amount of vacation days and the same vacation benefits. (Tr. 65.) These employees are also required to adhere to the same policy and practice of scheduling the vacation time they wish to utilize. (Tr. 65, Employer Ex. 2E.) Identically, production and warehouse employees receive the same company-recognized paid time off holidays each year. (Tr. 66-67, Employer Ex. 2G.)

Of course, it is undisputed that the production and warehouse employees all work at the same site – the Hartwell facility. Petitioner is not pursuing an election by employees at multiple sites, and production employees work at the same site as warehouse employees. Further emphasizing the shared interests between production and warehouse employees at this site are the identical employment policies. These policies include subjects such as attendance, overtime, vacation scheduling and paid time off, and other subjects govern production and warehouse employees' tenure with Nestlé Purina. Sect. III.B.4. There are no differences or distinctions in how

these policies apply to production or warehouse employees. *Id.* These factors for which production and warehouse employees share identical interests at the Hartwell facility strongly favor a unit that consists of both groups of employees.

2. Production and Warehouse Employees Share Similar Wages and Compensation, Supervision, Integrated Work Functions, and Interchange

Production and warehouse employees also strongly share similar interests under the first (method of wages or compensation), fourth (supervision), ninth (integration with the work functions of other employees), and tenth (interchange with other employees) community of interest factors under *Kalamazoo Paper Box Corp.*

The wages and compensation of production and warehouse employees—a fundamental economic aspect of the entire employment relationship—are nearly identical. Employees in both positions start at the same rate of pay, \$20.60 per hour, and all of them can achieve second and third levels of higher pay at identical wage rates. Sect. III.B.2.

Production and warehouse employees also share relationships with management and other departments at the Hartwell facility. The management personnel are the same for both groups, including Mr. Silva as Factory Manager and Mr. Gilbreth as Supply Chain Manager. Sect. III.B.3. Every production and warehouse employee reports to these two individuals, meaning any workplace decisions by Mr. Silva and Mr. Gilbreth will equally affect production and warehouse employees. Similarly, the decisions and practices implemented by the Safety, Quality, and Human Resources departments equally apply and affect production and warehouse employees. *Id.*

During the time that the Hartwell facility operates, production and warehouse employees are interdependent and rely on each other to complete their respective daily duties and responsibilities for their respective work. Sect. III.B.2. Without production employees completing their work, warehouse employees would not have product to move. *Id.* Likewise, without

warehouse employees completing their work, production employees could not continue to create product. *Id.* The Board has held on multiple occasions that a petitioned-for unit is inappropriate where it is interrelated in large degree with another unit. *See, e.g., United Rentals*, 341 NLRB No. 72 (2004) (“We find ... that the overwhelming and undisputed evidence of overlapping duties and interchange between the excluded employees and the petitioned-for employees, and of their common terms and conditions of employment, demonstrates that the petitioned-for unit is not an appropriate unit.”); *Jerry’s Chevrolet, Cadillac*, 344 NLRB 689, 693 (2005) (finding that the only appropriate unit included employees in *four different car dealerships* based on: (1) geographic proximity; (2) highly integrated and administratively centralized nature of the facilities; (3) functional integration of the employer’s operations; and, (4) similar wages and benefits); *Publix Super Markets, Inc.*, 343 NLRB No. 109 (2004) (relying on the functional integration between the proposed units to find they were required to be combined to constitute an appropriate unit). The highly continuous and interrelated nature of the Hartwell facility’s production makes the only appropriate unit inclusive of both production and warehouse employees.

Production and warehouse employees also regularly interact and can substitute for each other when needed. For example, a warehouse employee is assigned to complete line haul each day, which requires the employee to pull product off the production line and take it to the warehouse. Sect. III.B.1. Warehouse employees rotate in this job duty so that Nestlé Purina assigns them all to this role once every two weeks for a full day. *Id.* When warehouse employees pull product off a line, there is regular contact with production employees to address quality issues that the warehouse employee observes. *Id.* Additionally, Variety Pack employees convey completed pallets to the warehouse by forklift. *Id.* Further demonstrating the high similarity of skills these employees share, production and warehouse employee substitute for each other when needed. *Id.*

For example, Nestlé Purina has assigned warehouse employees to the Variety Pack to handfeed products into the equipment. *Id.*

These similarities will only grow in the imminent future as Nestlé Purina implements immediate structural changes to the Hartwell facility. Already working under a single roof in the continuous manufacturing environment of the Hartwell facility, production and warehouse employees will increase their common points of contact and personal interaction. Beginning with groundbreaking scheduled to occur in October 2020, production and warehouse employees will intersect and perhaps congregate with each other at the beginning and end of each day in the same parking area and utilize the same single facility entrance point. Sect. III.C.1. The space production and warehouse employees share together will also grow with centralized break rooms and locker rooms. Sect. III.C.2. These pending changes will make the community of interest between production and warehouse employees stronger in the near future.

3. Production and Warehouse Employees Share Comparable Qualifications, Training, and Skills and Job Functions

The fifth (qualifications, training, and skills) and sixth (job functions) community of interest factors under *Kalamazoo Paper Box Co.* also support including production employees with warehouse employees in the voting unit. These aspects of the respective positions share more in common than they are dissimilar to each other.

Production and warehouse employees share similar employment qualification standards at the Hartwell facility. For Nestlé Purina to consider a candidate in either position, it requires him or her to fulfill the same basic qualifications of a high school diploma or GED equivalent and experience in a manufacturing or equivalent requirement. Sect. III.B.2. From the outset of employment with Nestlé Purina, Hartwell facility production and warehouse employees begin to share a community of interest with each other.

The shared interests continue as production and warehouse employees begin employment with Nestlé Purina. Together, production and warehouse employees undergo a unified orientation and onboarding process to prepare for employment at the Hartwell facility. *Id.* During this orientation, where production and warehouse employees sit side-by-side, Nestlé Purina covers multiple topics of information that apply equally to all employees. *Id.* Training at the start of employment also includes forklift use for both production and warehouse employees. Sect. III.B.1. This training further duplicates the onboarding process for production and warehouse employees.

Production and warehouse employees also share job functions. Both groups of employees operate forklifts at the Hartwell facility and move products in their respective positions. Sect. III.B.1. Moreover, warehouse employees assist production employees in the Variety Pack role to handfeed product into that line. *Id.* Such shared job functions further highlight the shared interest between these employees.

The overall similarities in skill that production and warehouse employees share is further reflected by the transfers Nestlé Purina granted individuals between these positions. (Tr. 64-65.) Employee transfers have included changes from warehouse to production, warehouse to variety pack, production to variety pack. (*Id.*) Approximately six or seven employees transferred over the short course of time the facility has been manufacturing pet food. (*Id.*) These transfers are so fluid and common because of the shared interests that production and warehouse employees maintain with each other.

4. Petitioner's History of Bargaining Does Not Refute the Strong Community of Interest Between Production and Warehouse Employees

Petitioner's history of bargaining a collective bargaining agreement with the Hartwell facility's maintenance employees does not favor exclusion of production employees from the unit. Petitioner admits that the maintenance employees are distinguishable from production and

maintenance employees by their higher skill level and higher starting pay. (Tr. 151-52.) Whereas production and warehouse employees begin employment with Nestlé Purina at a rate of \$20.60 per hour, maintenance employees begin employment at a rate of \$26.15 per hour – approximately 27% higher. (Employer Ex. 10, Tr. 151-52.)

Beyond this significant difference among employees, Petitioner did not develop any evidence to support that the Employer's history of bargaining with maintenance employees supports recognizing a fractured unit of only warehouse employees. There is no evidence in the record to substantiate maintenance employees' function at the Hartwell facility, how maintenance employees organized, whether Nestlé Purina contested the unit, or whether maintenance employees and Nestlé Purina reached an election agreement. Absent admissible evidence, Petitioner cannot rely on this factor to establish that it weighs in favor of excluding production employees from the present voting unit, let alone outweighs all the other factors that strongly support including production employees with warehouse employees in the voting unit.

5. Any Differences Petitioner May Draw Are Minor in Comparison to the Strong Similarities Between Employees and Do Not Support Excluding Production Workers from the Voting Unit

The minor and trivial distinctions that Petitioner attempts to draw between production and warehouse employees related to shift handoff meetings and bonus calculations do not refute these employees' strong community of interest. Even with respect to these aspects of employment, production and warehouse employees share common interests. They attend town hall meetings together where management presents key communications to these employees as a unified group. Sect. III.B.4. Further, the majority of both production and warehouse employees' bonuses is determined based on overall facility performance. Sect. III.B.2. Differences among production and warehouse employees are small and do not disrupt the many factors that make them appropriate as one bargaining unit, voting group.



The fact that there are differences among groups of employees does not act to separate them into different bargaining units where the factors establishing similarities among these groups of employees are far outweigh those differences. *See Berea Publ'g Co.*, 140 NLRB 516, 528 (1963). The Board has stated that “organization by department or classification of department is not favored.” *American Publishing Company of Michigan*, 308 NLRB 563 (1992) citing *Airco, Inc.*, 273 NLRB 348 (1984). This is consistent with the Board’s policy “to determine an appropriate unit – not necessarily the most appropriate unit.” *Space Mark, Inc.*, 325 NLRB 1140 (1998). In fact, the Board has held its purpose in determining what constitutes an appropriate unit was intended by Congress “to prevent fragmentation of appropriate units into smaller inappropriate units.” *Overnite Transp. Co.*, 322 NLRB 723, 725 (1996). Excluding production employees from the voting unit contradicts this Congressional intent, and seeks to organize by department contrary to Board precedent.

Further supporting Nestlé Purina’s proposed production and warehouse employee unit, the Board has explained that “the manner in which a particular employer has organized his [operation] and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the [operation] and is thus an important consideration in any unit determination.” *International Paper Co.*, 96 NLRB 295, 298 fn. 7 (1951). At the Hartwell facility, the operation is setup as a singular integrated process in which production and warehouse positions are dependent upon one another, creating a strong community of interest between all of these employees. *See Potter Aeronautics*, 155 NLRB 1077 (1965) (finding that machine shop employees and electronics department employees were part of the same unit because the jobs of each group, though functionally different, depended on one another in an integrated process).

6. Manufacturing Settings Routinely Include Production and Warehouse Employees in the Same Unit

The third step of *The Boeing Co.* traditional community of interest analysis also favors a unit comprised of both production and warehouse employees because it is consistent with Board precedent and the parties' experiences. The Board traditionally does not recognize units that isolate drivers – an even more distinct group than warehouse employees generally – from other departments in a manufacturing setting. In *Standard Oil Co.*, 147 NLRB 1226 (1964), the Board found a community of interest between drivers and petroleum plant employees who shared the same overall supervision, had the same benefits, and were paid on the same basis. Even though the drivers, unlike the other plant employees, were required to wear uniforms and were subject to government regulations unique to drivers, the Board found that, “in all other respects their terms and conditions of employment are the same as those of other employees.” The Board held, “[I]t is clear . . . that the truck drivers and the plant employees share a close community of interest and are so functionally integrated as to preclude the representation of the truck drivers in a unit apart from the plant employees.” 147 NLRB at 1228.

Similarly, in *Calco Plating, Inc.*, 242 NLRB 1364, 1365 (1979), the Board required the inclusion of drivers with other production employees. The Board found that because the drivers and production employees were “directly supervised, in part, by the Employer’s vice president [although they did not have the same “immediate” supervision], ha[d] the same working conditions; comparable wages based on same pay scale; and the same mode of compensation, pay raises, and fringe benefits,” they were required to be included in the unit.

Notably, Nestlé Purina works with organized labor at other facilities. The units certified by the Board at these other locations offer additional support for ordering an election of production and warehouse employees at the Hartwell facility. These other certified units include the nearby

Fairburn, Georgia facility, where production and warehouse employees are part of the same bargaining unit and are represented by the Petitioner in this case. (Tr. 19.) Similarly, the Petitioner's sister local represents a single unit of production and warehouse employee's at Nestlé Purina's Edmund, Oklahoma facility. (Tr. 19-20.) Of the ten Nestlé Purina facilities where employees are represented by a union, precisely none have any bargaining unit that includes production or warehouse employees, but excludes the others. (Tr. 18-19.) The concept is entirely unknown throughout the entire Nestle Purina network of factories. Indeed, it is antithetical to Nestle Purina's "one team" culture in its factories. It is an extreme approach that improperly seeks a fractured unit in an integrated manufacturing facility, and the Region should reject it.

The experience of Petitioner's organizer and lead witness, Darrell Copeland, further substantiates that the only appropriate unit consists of production and warehouse employees at the Hartwell facility. While assigned to Local 42's geographic jurisdiction, Mr. Copeland represented employees at twelve factories on behalf of the Petitioner. (Tr. 144.) Of those units he represented, Mr. Copeland confirmed that none separated warehouse and production employees into distinct units. (Tr. 144.) Even in Mr. Copeland's experience outside of Local 42's geographic jurisdiction, all units with which he worked combined production and warehouse employees under the same unit. (Tr. 153-154.) Petitioner's experience in organizing demonstrates that production and warehouse employees together compose an appropriate unit. The attempt to exclude one type of employee from a unit of the other is simply out of step with the reality of how a factory works, and as confirmed by the Petitioner's evidence, is not done.

In this case, the comprehensive unit proposed by Nestlé Purina is the only appropriate unit because the production and warehouse employees have common qualification, skills, and training; are functionally integrated; have frequent contact with each other that will increase with imminent

changes at the Hartwell facility; have interchange with each other's departments, have virtually identical terms and conditions of employment, have similar pay rates and identical benefits, and have common supervision. The highly integrated nature of the production and warehouse employees illustrates that they are functionally integrated and share a community of interest under the standards embraced by the Board in *PCC Structural's*. Production and warehouse employees rely on each other in order to do their jobs. Excluding the production employees would result in an arbitrary, fractured bargaining unit.

## **B. The Region Should Direct a Manual Ballot Election**

### **1. The Board Favors Manual Elections**

A long history of Board precedent and practice favors conducting a manual election at the Hartwell facility. The NLRB Casehandling Manual specifically notes, "The Board's longstanding policy is that representation elections should, as a general rule, be conducted manually." *NLRB Casehandling Manual* Section 11301.2. The *Outline of Law and Procedure In Representation Cases* further states that mail ballot elections occur, "if at all, in unusual circumstances." Section 22-110.

Board precedent supports this guidance and limits any deviation from standard manual ballot election procedures to "extraordinary circumstances." *San Diego Gas & Electric*, 325 NLRB 1143 (1998). Importantly, the Board explained that the extraordinary circumstances ***must directly relate*** to the issue of voter participation. *Id.* at 1144 (the "extraordinary circumstances" must "make it difficult to vote in a manual election" and mail ballot is ***only permissible*** where it would "enhance the opportunity for all to vote.") (emphasis added).<sup>4</sup> The Board outlined these limited circumstances that may warrant use of mail ballots:

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<sup>4</sup> For this reason, previous circumstances akin to the current environment did not result in a default entitlement to a mail ballot but, rather, a necessary delay to proceed with the Board's preferred manual ballot format. *See e.g., Kanuai*

- (a) Where eligible voters are “scattered” because of their job duties over a wide geographic area;
- (b) Where eligible voters are “scattered” in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and
- (c) Where there is a strike, a lockout or picketing in progress.

*Id.* at 1145.

An on-site election, as opposed to a mail ballot, creates greater percentage of employee participation than in mail ballot elections. The Office of the General Counsel observed in 2008 that over the course of 2006–2007, the participation rate in manual elections was 81.57%, as compared to approximately 65% in mail or mixed manual-mail ballot elections. *See* G.C. Memo 08-05 (April 17, 2008).

Recent data definitively and empirically demonstrates that mail ballot elections significantly diminish voter turnout. During the week of March 7 to 13, 2020, more than 93% of manual ballots had a participation rate above 80% — only two out of thirty elections (6.7% of manual elections) resulted in lower rates. *See Wainfleet Co.*, No. 03-RC-256434 (63% rate); *Growing Seeds at Crystal Springs, Inc.*, No. 19-RC-256529 (75% rate). However, from March 14 to June 9, Regional Directors exclusively ordered mail ballot elections and nearly 40% of elections had a participation rate of 80% or less.

During this pandemic, the reality of low-voter turnout in mail ballot elections has only worsened. Mail ballot elections have consistently resulted in less than 60% voter turnout. *See, e.g., Altec Industries, Inc.*, 10-RD-257071 (59%); *Paragon Sys., Inc.*, No. 09-RC-259023 (55%); *River Mkt. Comm. Co-op*, No. 18-RC-256986 (54%); *Univ. Protection Serv., LLC*, No. 10-RC-257846

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*Coconut Beach Resort*, 317 NLRB No. 145 (1973)(election deferred until after hurricane); *A&B HVAC Servs., Inc.*, 2013 WL 5305832, at \*1 (Sept. 19, 2013)(election postponed due to after effects of Hurricane Sandy).

(52%); *Triple Canopy, Inc.*, No. 27-RC-257463 (37%); *Am. Sec’y Programs, Inc.*, No. 05-RC-256696 (36%); *Children & Adult Disability Ed. Servs.*, No. 04-RC-256028 (40%), *TMW Contracting, LLC*, 10-RC-261728 (44%). And numerous reports of service cutbacks and various problems with the US Postal Service portend ever more uncertainties about the efficacy of a mail ballot election. Badger, Emily et. al, *Is the Mail Getting Slower? Our Tracker Says Yes*, THE NEW YORK TIMES, <https://www.nytimes.com/interactive/2020/09/14/upshot/is-the-mail-getting-slower-tracker.html?action=click&module=Top%20Stories&pgtype=Homepage> (Sept. 21, 2020), The perception of the unreliability of voting by mail is fueled by the President himself, and the many people who believe his suggestions will either not participate in the vote, or, even if they do, may resist the legitimacy of the outcome of the vote. This will be highly disruptive to industrial relations and any collective bargaining at this factory.

Further, in *Fontanini Foods, LLC*, the Regional Director extended the mail ballot period twice because of low turnout. No. 13-RC-257636 (Reg’l Dir. June 29, 2020). In that case, the Region commingled the ballots and counted on June 17, 2020. However, after low turnout, the Regional Director extended the initial mail ballot period until July 1, 2020. The Regional Director then extended the period for a second time, until July 8, 2020, because only 227 of 401 (56.6%) mailed ballots had been returned as of June 29. Other issues also arose in that case, including: some employees had to pay to receive the NLRB package, missing ballots, duplicate ballots, and a few employees attempted to contact the NLRB but never heard back about ballot issues. Ultimately, the Region counted ballots and while it stated it received 227 ballots, the Region only counted 216. A manual election eliminates these concerns and best preserves the laboratory conditions for an election and the integrity of the voting process. Indeed, the Board has noted, “[m]ail ballot elections are more vulnerable to the destruction of laboratory conditions than are

manual elections because of the absence of direct Board supervision over employees' voting.” *Thompson Roofing, Inc.*, 291 NLRB 743 at n. 1 (1988).

In addition to the compelling case presented by voting statistics, none of the extraordinary circumstances identified by the Board in *San Diego Gas & Electric* are present to justify Petitioner's unsupportable preference to conduct the election by mail ballot. The voters all work at the same location and have overlapping schedules. These facts alone eviscerate both the first and second prongs of the *San Diego Gas & Electric* test. Finally, no strike, lockout or picketing is happening at the Hartwell Facility. The facts simply do not justify a mail ballot election and based off traditional mail ballot experience and recent COVID-19 mail ballot experience (both explained above), the Region must choose a manual election to optimize voter turnout ensure each vote is counted and maximize preservation of laboratory conditions.

Moreover, Regions and the Board no longer automatically defer elections to mail ballot processing. On July 6, 2020, the NLRB General Counsel endorsed a return to manual ballot elections through suggested protocols for in-person voting. Memorandum GC 20-10 (July 6, 2020). Regions have since followed with a growing trend towards conducting manual ballot elections again. *Tomra, NY Recycling, LLC*, 03-RC-264271 (Notice of manual ballot election filed Aug. 20, 2020), *Gulfport Energy Corporation*, 08-RC-263572 (Notice of manual ballot election filed Aug. 24, 2020), *Southern Glazer's Wine and Spirits of Upstate New York, LLC*, 03-RC-264197 (Notice of manual ballot election filed Aug. 25, 2020).

Further, the Board now closely scrutinizes Regional decisions to direct mail ballot elections. *Aspirus Keweenaw*, 370 NLRB No. 13 (Aug. 25, 2020) (granting review of Regional Director decision to conduct mail ballot election), *Perdue Foods LLC*, 370 NLRB No. 20 (Sept. 9, 2020) (same), *Airgas USA, LLC*, 16-RC-262896 (Sept. 24, 2020) (same). Whereas Regions were

afforded the opportunity to rely on mail ballot election processing for a temporary, limited period, those exceptions are no longer automatically granted.

Indeed, other Regions have successfully operated manual elections subject to social distancing procedures. *See, e.g., Hearthside Food Solutions LLC*, Case No. 15-RC-258901 (May 20, 2020 election), *Watson Bowman Acme Corp.*, No. 03-RC-262231 (Aug. 19, 2020 election). There has been no report of any problems with any manual ballot election taking place to date, and there is no reason to believe a manual ballot election will be any different at the Hartwell facility.

The General Counsel's protocols, which will be met here, provide a clear path for the Board to return to the standard manual ballot process. Nestlé Purina guarantees the requirements of those protocols. With these safeguards secured, the Region should order a manual ballot election at the Hartwell facility for production and warehouse employees.

2. Nestlé Purina Maintains a Safe Working Environment that Employees Use Every Work Day

A manual ballot election will take place in an environment that only improves upon the rigorous safety measures Nestlé Purina has already implemented and which warehouse and production employees attend each day they work at the Hartwell facility. Nestlé Purina has implemented regular safety procedures to nearly eliminate any risk of contracting the COVID-19 virus at the Hartwell facility. Sect. III.D. Employees are required to wear face coverings at all times, undergo temperature checks to enter the facility, and respond to screening questions on a daily basis. *Id.* While nine employees have contracted COVID-19, none of those cases were traced back to transmission at the Hartwell facility. (Tr. 132.) This impeccable safety records compels the conclusion that Nestlé Purina is fully capable of providing a healthy voting environment that minimizes the risk of becoming ill.



3. Nestlé Purina Will Provide a Safe Voting Environment

Nestlé Purina will meet and exceed the General Counsel’s protocols to provide a clean voting environment that adheres to social distancing practices. Employees will be able to individually complete ballots in a safe, secret, and clean environment within a trailer Nestlé Purina will make available to the Region. Nestlé Purina will modify the trailer to include fans for air circulation to minimize the possibility of air transmission. Further, the trailer is large in size at 36 feet by 50 feet so voters, observers, and the Region agent can maintain a safe distance from each other at all times and avoid close contact. Nestle Purina offers to erect a large tent structure so that voting can essentially be done in an “open air” environment if the Region prefers. Voting tools will be sanitized and individually used where possible and in conformance with the General Counsel’s protocols. Nestlé Purina guarantees all General Counsel protocol certifications will be provided, along with necessary post-election notifications. Thus, a manual ballot election that takes place under these extraordinary safety precautions and immediately before and after scheduled shifts presents an opportunity to ensure maximum employee participation in a safe election environment adjacent to production and warehouse employees’ work location and that presents little difference in risk compared to a mail ballot election.

4. “Extraordinary Circumstances” Do Not Exist to Deviate from the Standard Manual Ballot Process

Local COVID-19 developments refute any notion that a mail ballot election is necessary to ensure employee safety. Instead, recent data compels the Region to order a manual election. As of September 28, 2020, Georgia’s seven-day average of new cases reported was down 68% compared to its peak one month earlier. *Georgia Department of Public Health*, Daily Status Report, <https://dph.georgia.gov/covid-19-daily-status-report> (last accessed September 29, 2020). Specifically, on July 24, 2020, the seven-day rate of cases was 3,743.7, and on September 28,

2020, the seven-day rate of cases was 1,197.4. *Id.* These outstanding improvements demonstrate that the risk any employee would contract COVID-19 as a result of a manual election are exceedingly low.

Data for the local area surrounding the Hartwell facility demonstrates even safer circumstances. According to COVID-19 data published by the state of Georgia, the Hartwell facility resides in one of the least infected counties in all of Georgia. *Id.* As of September 28, 2020, the seven-day moving average of cases in Hart County was just 2.6 cases. *Id.* This compares to the peak seven-day moving average of 9.6 cases on August 2, 2020. These statistics demonstrate the virus is actively diminishing in the regional and local area where a manual ballot election will safely take place.

The Region should reject Petitioner's claim at the Pre-Election Hearing that the Region should conduct a mail ballot election due to the risk of possible surface transmission of COVID-19 through counting manual ballots. Petitioner did not present any evidence to support this claim and it is inconsistent with the best available scientific information on the novel coronavirus. While surface transmission was a concern initially at the outset of the pandemic, that concern has diminished. The Centers for Disease Control and Prevention has explained, "The primary and most important mode of transmission of COVID-19 is through close contact from person-to-person" and surface transmission "isn't thought to be the main way the virus spreads." *Centers for Disease Control and Prevention*, CDC updates COVID-19 transmission webpage to clarify information about types of spread, <https://www.cdc.gov/media/releases/2020/s0522-cdc-updates-covid-transmission.html> (May 22, 2020). Current studies of the virus lead doctors to conclude that surface transmission "is theoretically possible, but highly unlikely" and requires "the perfect combination of events" to become infected in this way. Watson, Stephanie, Coronavirus on

Surfaces: What's the Real Risk? *WebMD Heath News*,

<https://www.webmd.com/lung/news/20200903/coronavirus-on-surfaces-whats-the-real-risk>

(Sept. 3, 2020). Nestle Purina is willing to provide disposable sanitary gloves for use in the election process, and all the sanitizing materials that have proved to be so successful in use in the Hartwell facility. Petitioner's concerns for surface transmission of COVID-19 are simply unsupported by actual evidence and do not justify an exception to the standard practice of manual ballot elections.

## V. CONCLUSION

Petitioner asks the Region to deviate from well-established procedures both with respect to the scope of the unit subject to election and the method through which employees will cast their deciding votes. The facts and precedent strongly support both ordering an election with production and warehouse employees joined as one unit and for the Region to adhere to the preferred manual ballot election process.

Respectfully submitted this 29th day of September, 2020.

OGLETREE, DEAKINS, NASH, SMOAK &  
STEWART, P.C.

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**ATTORNEYS FOR  
NESTLÉ PURINA PETCARE COMPANY**

## **CERTIFICATE OF SERVICE**

I hereby certify that on September 29, 2020, a true and correct copy of the foregoing Employer's Post-Hearing Brief was Electronically filed as a .pdf document via the NLRB's e-filing system and transmitted via U.S. First-Class Mail to the Regional Director and via e-mail to the Petitioner as follows:

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# **Attachment C**

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10**

<b>NESTLE PURINA PETCARE CO.</b>	)	
	)	
<b>Employer,</b>	)	
	)	
	)	
<b>and</b>	)	<b>CASE NO. 10-RC-265325</b>
	)	
	)	
<b>BAKERY, CONFECTIONERY, TOBACCO</b>	)	
<b>WORKERS AND GRAIN MILLERS UNION</b>	)	
<b>LOCAL 42</b>	)	
<b>Petitioner.</b>	)	

**PETITIONER’S POST-HEARING BRIEF**

COMES NOW, Petitioner in the above-captioned case, the Bakery, Confectionery, Tobacco Workers & Grain Millers Union, Local 42 (the “Union”) and submits this post-hearing brief to the Regional Director of NLRB, Region 10. As argued below, the petitioned-for unit of all full-time and regular part-time warehouse employees of Nestlé Purina PetCare Company (the “Employer”) working at its Hartwell, Georgia facility, is appropriate because all warehouse employees share a community of interest, and production operators have meaningfully distinct interests in the context of collective bargaining that outweigh their similarities with warehouse employees.

**I. STATEMENT OF FACTS**

The Employer’s Hartwell, Georgia facility (the “Plant”) opened in May 2018 as solely a distribution center. (Tr. 20)<sup>1</sup>. Approximately a year ago, the Company began to produce wet cat

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<sup>1</sup> The transcript of the hearing is cited as “Tr.(page)”. Board exhibits are cited as “BX(#)”. Employer exhibits are cited as “EX(#)”. Union exhibits are cited as “UX(#)”.

food at the Plant. (*Id.*). The Plant currently has 2-3 production lines running. (Tr. 20-21, 23). The Plant currently employs approximately 145 hourly production operators, (Tr. 37), and approximately 54 forklift operators<sup>2</sup> that work in the warehouse<sup>3</sup> of the Plant. (Tr. 30.) Approximately 15 maintenance technicians also work at the Plant. (Tr. 138). The maintenance technicians are represented by the Union in a separate bargaining unit and are covered by their own collective bargaining agreement. (UX1; 2; 8).

The Plant is comprised of four groups/departments<sup>4</sup>: production, maintenance, warehouse, and quality (Tr. 91-92). The warehouse is located on the north-west side of the Plant. (EX6). The warehouse has its own entrance identified as the “Distribution Center Employee and Visitor Entrance.” (UX5). The production lines are located on the eastside of the Plant. (EX6). Production and maintenance employees enter the Plant through the “Employee Center” on the eastside of the Plant. (Tr. 27, 122). Warehouse employees generally park in a parking lot south of the distribution center, (Tr. 23), and production and maintenance employees park in a separate lot adjacent to the Employer Center entrance. (Tr. 101). However, a new parking lot is under construction, and when it is completed, forklift operators will park in the same lot as the production operators. (Tr. 24).

Forklift operators clock-in for work on a timeclock that is near the entrance of the Distribution Center, (Tr. 103), while production and maintenance employees use a timeclock near the Employer Center entrance. (Tr. 104, 122). There are also two separate break rooms with locker rooms – one in the Employer Center and one in the warehouse. (Tr. 29). Production and maintenance employees primarily use the break room in the Employee Center, and forklift

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<sup>2</sup> The official job title of employees working in the Plant’s warehouse is “forklift operator” or “FLO”. (Tr. 90).

<sup>3</sup> The terms “warehouse” and “distribution center” are used interchangeably herein.

<sup>4</sup> Supply Chain Manager Cy Gilbreth used the term “department” to refer to production, maintenance, and/or warehouse on multiple occasions in his testimony. (*See e.g.* Tr. 16, 43, 58, 60, 64, 65, 73, 74, 75).

operators use the break room in the distribution center. (Tr. 104). There is an area of the Plant called “Variety Pack” that is adjacent to the warehouse. (EX6). In Variety Pack, different flavors of pet food are repackaged into a special variety pack product. (Tr. 17). Three production operators work in Variety Pack and they take their breaks in the distribution center breakroom, (Tr. 104), and clock-in on the distribution center time clock. (Tr. 103-104).

The three Variety Pack employees are distinguishable from the other production operators because they are qualified (as opposed to “certified”)<sup>5</sup> forklift operators like the warehouse employees. (Tr. 108). They drive their packaged product into the warehouse themselves for storage and are the only production employees that regularly enter the warehouse. (Tr. 42-43, 123). The Employer’s Supply Chain Manager Cy Gilbreth testified that the three operators in Variety Pack are eligible for overtime in the distribution center, (Tr. 108), but forklift operator Richie Kopf - who has worked at the Plant for approximately eighteen months - testified that the last time he observed a Variety Pack operator work overtime in the warehouse was five to six months ago. (Tr. 157-158).

Hourly plant employees (production, maintenance, and warehouse) are assigned to work either the red or blue (day), or gray, green, yellow, or orange (night), shifts. (Tr. 112-113; *see also* UX6). Variety Pack currently runs only during day shift Monday through Friday. (Tr. 31). There is one Human Resources Department for production, maintenance, and warehouse employees (Tr. 124). All hourly employees receive the same standard employee benefit package. (Tr. 124-125). All hourly employees are required to wear the same uniforms, safety shoes, and protective eyewear. (Tr. 127; EX11).

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<sup>5</sup> Qualified was explained as “proficient” in forklift operation. (Tr. 110-111).



Forklift operators begin their workday with a shift handoff meeting. (Tr. 90). The meeting is normally attended only by forklift operators and their direct supervisor, known as a “Coordinator”. (Tr. 90). There are no production operators present in the warehouse pre-shift meetings. (Tr. 90-91). Forklift operators have three main functions: 1) case picking, 2) unloading trucks, and 3) line haul/line pull. (Tr. 32-33). Case picking involving pulling products from slots in the warehouse and assembling pallets with the products. (Tr. 32-33). Unloading involves pulling products from trucks arriving from other Purina facilities and loading them into the warehouse. (Tr. 33). Warehouse employees have virtually no interaction with production employees when performing case picking and truck unloading duties. (Tr. 33). The only interaction that forklift operators have with production operators occurs during line haul work. (Tr. 33). Line haul involves driving a forklift to the production floor, picking up products, and bringing them to the warehouse for storage. (Tr. 118). Forklift operators are scheduled to perform line haul duties on a rotation, and each forklift operator works the line haul shift approximately once every two weeks. (Tr. 33-34; EX15). The Employer has plans to automate the line haul process on at least two production lines with an automated guided vehicle (“AGV”). (Tr. 118). When the AGV’s are fully operational, the line haul process for the production lines on which the AGV is utilized will be eliminated. (Tr. 119).

Unlike forklift operators, maintenance employees have regular daily interaction with production operators because they work directly on the production floor. (Tr. 123). Production and maintenance employees work side-by-side when equipment goes down and mechanics are called to perform repairs. (Tr. 123-124). Production employees are also required to perform some low-level maintenance work, such as oiling and preventative maintenance tasks. (Tr. 124). Both production and maintenance employees carry a “lock” that is used to turn off machinery when it

is being repaired. (Tr. 164-165). Forklift operators are not provided with a lock at work. (Tr. 165).

Occasionally, forklift operators or production operators are pulled from their respective jobs to perform “handfeeding” work in Variety Pack. (Tr. 83). Handfeeding involves physically taking cans out of a case and putting them onto a conveyer belt so that the machine can case them into a variety pack of products. (Tr. 83). It is a “general laborer” function that involves simply pushing cans of cat food down a conveyor belt. (Tr. 83, 119). Gilbreth testified that since he has worked at the plant, warehouse employees have performed handfeeding in Variety Pack “six or seven times.” (Tr. 49-50).

Forklift operators do not fill-in for Variety Pack or other production operators, or vice versa, because employees are trained for their specific job and different skill sets and qualifications are required for the respective positions. (Tr. 120-121). To be hired to work in the warehouse, an applicant must have at least one year of “forklift experience within a high volume distribution center, manufacturing or military environment.” (EX12). For a production operator job, “6 months+ experience working in a manufacturing, production, agriculture, warehouse, military or related environment”, is required. (EX13).

All new hires at the Plant (salaried and hourly) undergo a week-long orientation together. (Tr. 58, 114). They are then split-out to undergo group-specific hands-on training. (Tr. 58-59, 114). Forklift operators receive approximately four weeks of hands-on forklift training in the warehouse partnered with a trainer, (Tr. 114-115), and then four more weeks of independent work with close supervision and support. (Tr. 115). Production operators do not receive four weeks of hands-on forklift training. (Tr. 115). Instead, production operators receive four weeks of hands-on training on the equipment that they are assigned to operate, and they also receive

cross-training on the other production lines. (Tr. 115-116). Production operators receive a day-long forklift training, which is much less intensive than the forklift training received by warehouse employees. (Tr. 115). Gilbreth testified that forklift operators receive safety training on production equipment (emergency stop and lock out/tag out), (Tr. 117), but forklift operator Kopf testified that he never received safety training on production equipment and does not know of any warehouse employee who has received safety training. (Tr. 157).

Forklift operators are directly supervised by a “Supply Chain Coordinator”. (UX7). Coordinators are stationed in the warehouse and only supervise forklift operators. (Tr. 97). The next line of supervision are the “Supply Chain Facilitators.” (UX7). Facilitators are also stationed in the warehouse and only supervisor forklift operators. (Tr. 97-98). The warehouse has its own Manager, currently Brian Saunders. (UX7). As his title suggests, Saunders’ primary responsibility is management of the warehouse. (Tr. 98). Cy Gilbreth is currently the Supply Chain/Logistics Manager, (UX7), and his main responsibility is overseeing the warehouse. (Tr. 16). Gilbreth is not involved in day-to-day supervision of production operators. (Tr. 99). Production operators have their own Facilitators and Production Managers. (UX7). Winston Silva is the Factory Manager over the entire Plant. (Tr. 31; UX7).

Forklift operators and production operators have different pay progressions. Forklift operators start at \$20.60/hour (Phase I) and increase to \$21.63/hour after 180 days (Phase II). (EX10 at p. 1). To receive the highest wage rate of \$22.66/hour (Phase III), forklift operators must achieve an average of 85% efficiency in loading, unloading, and case picking for eight consecutive weeks. (*Id.*) Production operators also start at \$20.60/hour (Phase I). (EX10 at p. 2). Production operators then can advance to \$21.63 (Phase II), \$22.66 (Phase III), \$23.69 (Phase IV), and \$24.72 (Phase V), “based on competency matrix completion.” (EX10 at p. 2). Gilbreth

testified that the pay progression for warehouse and production is different because warehouse employee pay increases are based on a "labor management system" that calculates efficiency, while production operators receive wage increases based on the completion of a competency matrix which involves completing job trainings. (Tr. 34, 48, 57). Maintenance technicians previously received wage increases "[b]ased on completion of competency matrix." (EX10 at p. 2). However, in their collective bargaining agreement, a new wage scale was established. Maintenance technicians are now classified into categories of "A", "B", "C", or "D", and receive annual across-the-board wage increases based on their category placement. (UX8 at p. 16).

All hourly employees are eligible for a quarterly performance bonus, which is known as the "PIP." (Tr. 72). The PIP amount is based on whether each group/department reaches a quarterly goal. As Gilbreth explained, each group/department has a different quarterly goal:

[A]ll hourly employees are eligible for what's called a PIP, and so once a quarter there is certain goals that we have to hit for each month of that quarter. We [] set those goals out with the management's teams for each group, but it's separated out, so warehouse has different goals from production, and production different from quality, and stuff like that. But as a whole, 60 percent of the PIP is going to be factory-wide, and then for your individual teams it's 40 percent spread of how well did we contribute to the overall goal. And that's for [] each department.

(Tr. 72-73).

Each employee within a group/department receives from 0 to 7.5% of their quarterly pay as a PIP bonus. (Tr. 73). Each production operator receives the same percentage and each forklift operator receives the same percentage, but the percentage that production operators receive may be more or less than what the warehouse employees receive, because 40% of the PIP bonus is determined by group/department specific goals. (Tr. 73, 91-92). For example, in September 2020, all forklift operators received a 2.25% PIP bonus and production operators received a

1.75% PIP bonus. (Tr. 92). For the 40% of the bonus that is specific to the warehouse, Gilbreth testified that it is based on factors such as “inventory accuracy” and “man-hours-per-unit-load sold.” (Tr. 93). For production, their 40% is calculated based on entirely different factors, such as a “Quality Monitoring System check” and “asset intensity”. (Tr. 94).

Hourly employees can apply for a position in a different group/department. The record reflects that approximately 6-7 forklift operators have applied for, and accepted, jobs in production. (Tr. 65). For an employee to transfer to another group/department, there must first be a vacancy in that group/department and a job posted. (Tr. 125). An applicant then must fill-out a form and undergo an interview for the position. (Tr. 125-126). Management has the right to select their preferred candidate for the open job. (Tr. 126).

There was some testimony about planned expansion at the Plant, but the Employer did not provide any specific details other than that a new parking lot is under construction. (Tr. 82, 128-129). Although there are plans for the forklift operators to park in the same parking lot as production operators, all other aspects of the forklift operator daily job functions, as discussed above, will remain the same. (Tr. 129).

## **II. ARGUMENT**

When a party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit, the three-step analysis set forth in *The Boeing Company*, 368 NLRB No. 67 (2019) applies. The record evidence in this case shows that under the *Boeing* test, the petitioned-for unit of forklift operators is appropriate, because the forklift operators all share a community of interest, production operators have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with forklift operators, and there are no industry-specific guidelines that bar the petitioned-for unit.

The Board's decision in *Boeing* did not alter the well-established rule that "a proposed unit need only be *an* appropriate unit and need not be *the most* appropriate unit." *PCC Structural, Inc.*, 365 NLRB No. 160, slip op. at 12 (2017) (emphasis in original). Also, it remains general Board policy to attempt to select a unit that is the smallest appropriate unit encompassing the petitioned-for employee classifications. *See e.g. R & D Trucking, Inc.*, 327 NLRB 531 (1999); *State Farm Mutual Automobile Insurance Co.*, 163 NLRB 677 (1967), *enfd.* 411 F.2d 356 (7th Cir. 1969). Under *Boeing*, when a party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit, the Board will: (1) evaluate whether the members of the petitioned-for unit share an internal community of interest with each other; (2) consider whether the employees excluded from the unit have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members; and (3) consider guidelines the Board has established for appropriate unit configurations in specific industries. *Boeing*, 368 NLRB No. 67, slip op. at 3-4. As argued below, the petitioned-for unit meets the tests for an appropriate unit.

#### **A. Forklift operators at the Plant share an internal community of interest**

Under the first step of the *Boeing* analysis "shared interests among members of the petitioned-for unit" must be identified. *Id.*, slip op. at 3. That is, "the analysis logically begins by considering whether the petitioned-for unit has an internal community of interest using the traditional criteria."<sup>6</sup> *Id.* Here, the record evidence makes clear that the petitioned-for unit of all warehouse employees/forklift operators is appropriate. All the petitioned-for employees work

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<sup>6</sup> The traditional community of interest criteria are "whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised." *PCC Structural*, 365 NLRB No. 160, slip op. at 5.

in the warehouse and all share the job title of forklift operator. The warehouse is organized into its own separate group/department at the Plant. (Tr. 91). The forklift operators have distinct skills and training. Applicants for a warehouse position must have “at least one year of forklift experience within a high volume distribution center, manufacturing or military environment.” (EX12). They receive 8 weeks of on-the-job forklift training, (Tr. 114-115), and are required to be proficient and efficient in forklift operation based on their performance on the Employer’s labor management system. (Tr. 34, 57). They have distinct job functions and perform distinct job duties as well; they are the only employees at the Plant that perform case picking, truck unloading, and line haul/line pull. (Tr. 32-33).

The forklift operators have frequent contact with each other because they all work in the warehouse, park in the same parking lot, use the same entrance, clock-in on the same timeclock, take their breaks in the same breakroom, and use the same locker room. (Tr. 23, 29 103, 104; UX5). Forklift operators all work either the red or blue (day), or gray, green, yellow, or orange (night), shifts. (Tr. 112-113; *see also* UX6).

Forklift operators share distinct terms and conditions of employment. They are subject to the same pay progression, (EX10 at p. 1), and receive the same quarterly performance bonus. (Tr. 73, 91-92). Forklift operators share the same Human Resources Department, (Tr. 124), receive the same standard employee benefit package, (Tr. 124-125), and are required to wear the same uniforms, safety shoes, and protective eyewear. (Tr. 127; EX11).

Finally, forklift operators share common supervision. Cy Gilbreth is currently the Supply Chain/Logistics Manager, (UX7), and his main responsibility is overseeing the warehouse. (Tr. 16). The warehouse also has its own Manager, Brian Saunders. (Tr. 98). All forklift operators are directly supervised by a Coordinator and a Facilitator. (Tr. 97-98; UX7).

The record evidence shows that forklift operators undoubtedly share an internal community of interest based on the Board's traditional community of interest criteria. Furthermore, they share identical interests in the context of collective bargaining. As a result, the petitioned-for unit is appropriate at the first step of the *Boeing* analysis.

**B. Production operators have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with forklift operators**

Under the second step of the *Boeing* analysis, "the Board must determine whether the employees excluded from the unit have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members. If those distinct interests do not outweigh the similarities, then the unit is inappropriate." *Id.*, slip op. at 4 (citations and quotations omitted, emphasis in original). The Board must "analyze the distinct and similar interests and explain why, taken as a whole, they do or do not support the appropriateness of the unit." *Id.* Thus, in this case, the question is whether production operators have meaningfully distinct interests in the context of collective bargaining that outweigh the similarities between production operators and forklift operators. As explained below, the record evidence shows that production operators possess significant distinct interests that do outweigh their shared interests with forklift operators, and therefore the petitioned-for unit is appropriate at the second step of the *Boeing* analysis.

As Supply Chain Manager Gilbreth testified on direct examination, "Obviously, the [production and warehouse] jobs are different." (Tr. 69). Production operators possess distinct interests in the context of collective bargaining. First, production operators are subject to a completely different pay progression than forklift operators and are evaluated on their job ability based on completely different performance standards. Production operators have five wage phases that are reached "based on competency matrix completion." (EX10 at p. 2). In contrast,



forklift operators have three wages phases. (*Id.*). Indeed, Supply Chain Manager Gilbreth testified that the pay progression for warehouse and production is different. (Tr. 34, 48, 57). Warehouse employee pay increases are based on a “labor management system” that calculates efficiency in loading, unloading, and case picking. (EX10 at p. 1). Production operators receives wage increases based on completely different criteria; the completion of a competency matrix which involves trainings on job aspects. (Tr. 48).

Next, the criteria used to calculate the quarterly PIP bonus received by production operators is distinct from the criteria used for forklift operators. Gilbreth testified that 40% of the PIP is determined by whether each group/department archives a department-specific goal that is set by the management team of the department:

[O]nce a quarter there [are] certain goals that we have to hit for each month of that quarter. We [] set those goals out with the management's teams for each group, but it's separated out, so warehouse has different goals from production [...]

(Tr. 72). The percentage of the PIP bonus that is specific to each department is calculated based on distinct criteria. For production, their 40% is calculated based on factors such as a “Quality Monitoring System check” and “asset intensity”, (Tr. 93), while the warehouse PIP is based on “inventory accuracy” and “man-hours-per-unit-load sold.” (Tr. 94). Thus, the record evidence shows that the interests of production operators related to compensation - arguably the most meaningful collective bargaining interest<sup>7</sup> - are distinct.

Production operators also have meaningfully distinct skills, training, and job functions. It is undisputed that production operators perform an entirely different job on different equipment that requires different training than forklift operators. (Tr. 115). Production operators do not fill-

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<sup>7</sup> See *Barrentine v. Arkansas–Best Freight System, Inc.*, 450 U.S. 728, 738 (1981) (explaining that wages and hours are “subjects at the heart of the collective-bargaining process.”)

in for forklift operators because different skill sets and qualifications are required for the respective positions. (Tr. 121-122). To be hired as a production operator, “6 months+ experience working in a manufacturing, production, agriculture, warehouse, military or related environment”, is required. (EX13). Indeed, the only evidence in the record of interaction between forklift operators and production operators on the production floor occurs when forklift employees perform line-haul duties, picking up products from the production floor and bringing them to the warehouse for storage. (Tr. 33, 118). However, the Employer has plans to automate the line haul process on at least two production lines by using an AGV. (Tr. 118). When the AGV’s are fully operational, the line haul process for the production lines on which the AGV is utilized will be eliminated. (Tr. 119). Production operators also use their own entrance, (Tr. 27, 122), time clock, (Tr. 104, 122), and break room. (Tr. 104, 122).

There is some evidence that the three production operators that work in Variety Pack do interact with forklift operators, but the record shows that the interaction is *de minimus* when viewed in the context of production at the Plant as a whole. Production operators working in Variety Pack enter the warehouse to store their product, (Tr. 42-43), take breaks in the warehouse breakroom, (Tr. 104), and have contact with forklift operators when forklift operators perform handfeeding work on the Variety Pack line (only six or seven occurrences over the last six months). (Tr. 49-50). The Employer claimed that Variety Pack operators can work overtime in the warehouse, but there is no evidence in the record of any overtime worked except forklift operator Richie Kopf’s testimony that five-six months have passed since a Variety Pack operator worked in the warehouse. (Tr. 157-158). The evidence of interaction and interchange between Variety Pack operators and forklift operators is not material or meaningful in light of the

minimal interaction, and complete absence of temporary interchange, of production operators and forklift operators Plant-wide.

Production operators also have distinct supervision. Besides sharing the same Factory Manager, all the supervision of production operators is distinct from forklift operators. (UX7). Production operators are supervised by Facilitators and Production Managers who do not supervise forklift operators, while forklift operators have their own Facilitators, Coordinators, and Managers responsible for their supervision. (Tr. 97-99).

Furthermore, the warehouse is not functionally integrated with the production lines. As stated repeatedly above, the warehouse has a separate entrance, time clock, and break room, and currently has its own parking lot. Even after the new parking lot is completed, forklift operators will still have their own break room, use their own time clock, attend their own pre-shift meetings, and with the exception of line hauls (which will be automated in the future) perform all of their work far away from the production lines. (Tr. 30, 129).

Finally, the bargaining history at the Plant favors finding that the warehouse is an appropriate unit. In *Boeing*, the Board reaffirmed the well-established principle that “[i]n determining appropriate bargaining units, the Board has [] long given substantial weight to prior bargaining history.” *Id.*, slip op. at 2. In September 2019, the Employer stipulated that maintenance technicians comprise a separate and appropriate bargaining unit. (UX1). The Employer and Union recently reached a final agreement on a collective bargaining agreement covering only maintenance technicians working at the Plant. (UX8). Thus, through its actions, the Employer has conceded that the maintenance technicians possess meaningfully distinct interests in the context of collective bargaining that outweigh similarities with other hourly employees.

Unlike forklift operators, maintenance technicians work side-by-side with production operators every day. (Tr. 123-124). Production operators are also required to perform some low-level maintenance work, such as oiling and preventative maintenance tasks. (Tr. 124). Both production and maintenance employees carry a “lock” that is used to turn off machinery when it is being repaired. (Tr. 164-165). Moreover, production operators and maintenance technicians use the same employee entrance, (Tr. 27, 122), timeclock, (Tr. 104, 122), and break room. (Tr. 104).

Maintenance technicians share a stronger community of interest with production operators than production operators share with forklift operators. The Employer agreed that maintenance technicians constitute an appropriate unit and have distinct interests in collective bargaining. It follows that since maintenance technicians warrant their own unit and collective bargaining agreement, certainly forklift operators – that share a far weaker community of interest with production operators than maintenance technicians do – also possess distinct interests in the context of collective bargaining.

The collective bargaining agreement reached by the Employer and the Union for the maintenance unit proves that the interests of the production unit are meaningfully distinct and outweigh similarities with the forklift operators. Maintenance technicians previously received pay increases “based on completion of competency matrix”, the same as how production operators currently receive their wage increases. (EX10 at p. 2). However, under the new collective bargaining agreement, maintenance technicians no longer advance in pay based on a competency matrix, but now receive annual across-the-board wage increases based on their category placement. (UX8 at p. 16). Thus, a collective bargaining agreement was reached covering one group/department of the Plant and their former pay progression system was

replaced through collective bargaining. Yet the sky did not fall. This is direct and concrete evidence that the groups/departments at the Plant have meaningfully distinct interests and can be separated for purposes of collective bargaining without resulting in “arbitrary, irrational, or fractured units”. *PCC Structural*s, slip op. at 5 (quotations omitted).

The Employer will likely argue that combined production and distribution units represented by the Union and other locals of its International Union constitutes relevant bargaining history. For one, the Union disputes that the unit makeup of other employers and other local unions is relevant in any way to the issues presented in this case. Nevertheless, the bargaining history at the only other Purina plant in Georgia represented by the Union supports the Union’s position in this case. At the Fairburn, Georgia Purina facility the Quality Control employees – one of the groups/departments identified by the Employer (Tr. 91-92) – has a separate collective bargaining agreement. (UX9). Thus, the bargaining history at the only other Purina plant represented by the Union shows that groups/departments have distinct interests for the purpose of collective bargaining.

The Employer will also likely argue that the 6-7 permanent transfers from warehouse to production demonstrates that similarities between production and warehouse are not outweighed. However, a forklift operator cannot simply transfer into production, instead there must first be an opening and they then must apply for the position and undergo an interview. (Tr. 125-126). There is no guarantee that a forklift operator will be hired for a vacant position, and if a production operator applies for the same job, the production operator would likely be selected if they had experience working similar equipment. (Tr. 126). When hired, the former forklift operator still must complete extensive training. (Tr. 116-117). Therefore, the evidence of

permanent transfers does not show that similarities between production and warehouse are not outweighed by the distinct interests of production operators.

For the reasons argued above, the petitioned-for unit is appropriate at the second step of the *Boeing* analysis.

### **C. There are no industry-specific guidelines applicable to this case**

The third step of the *Boeing* analysis only applies in situations where the Board has established unit configuration guidelines for specific industries, for example in cases involving public utilities, defense contractors, and retail establishments. *Id.*, slip op at 5. No industry-specific guidelines exist related to the petitioned-for unit and therefore the third step of the *Boeing* analysis is not applicable. Indeed, the Board in *Boeing* specifically rejected the argument that “the Board has established a presumption in favor of a plantwide unit for integrated manufacturing facilities that must be rebutted by a union seeking a smaller unit.” *Id.*, slip op. at 6. The Board explained that it has never held that a “less-than-plantwide manufacturing unit is presumptively inappropriate, or that a petitioner seeking such a unit bears any heightened burden of proving that it is appropriate.” *Id.* Accordingly, the third step of the *Boeing* analysis is not applicable here. Because the petitioned-for unit is appropriate under the first two *Boeing* factors, the Union respectfully requests that the Regional Director order an election.

### **III. ELECTION DETAILS**

As argued at the September 22, 2020 hearing and in its Responsive Statement of Position, (BX5), the Union prefers a mail ballot election due to the extraordinary circumstances created by the COVID-19 pandemic in the State of Georgia and Hart County.<sup>8</sup> *See e.g. Sea World of*

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<sup>8</sup> As of September 28, 2020, there were 315,281 confirmed cases of COVID-19 in Georgia, and 510 in Hart County (1953.5 cases per 100k residents). Georgia Department of Public Health Daily Status Report, <https://dph.georgia.gov/covid-19-daily-status-report> (last visited Sep. 29, 2020)

*Florida, LLC*, Case No. 12-RC-257917, 2020 WL 5658311 (Sep. 22, 2020). However, because the Employer made assurances at the hearing that it would meet the safety protocols for an in-person election outlined in Memorandum GC 20-10, (Tr. 169), the Union will go forward with a manual election if one is directed.

This 29<sup>th</sup> day of September, 2020.

s/ Michael B. Schoenfeld  
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*Attorney for Petitioner*

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10**

<b>NESTLE PURINA PETCARE CO.</b>	)	
	)	
<b>Employer,</b>	)	
	)	
<b>and</b>	)	<b>CASE NO. 10-RC-265325</b>
	)	
	)	
<b>BAKERY, CONFECTIONERY, TOBACCO</b>	)	
<b>WORKERS AND GRAIN MILLERS UNION</b>	)	
<b>LOCAL 42</b>	)	
<b>Petitioner.</b>	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on September 29, 2020, I submitted the foregoing **PETITIONER’S POST-HEARING BRIEF** to the National Labor Relations Board, Region 10 via the NLRB e-filing system, and served a copy of the same on the following via e-mail:

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*NLRB Region 10 Field Examiner*

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*Counsel for the Employer*

By: s/ Michael B. Schoenfeld